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Responsibility of Transnational Corporations for Human Rights Violations under International Law

Master's Thesis

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V Praze dne 15. dubna 2020 Helena Švandová

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Table of Contents

Abbreviations

ARSIWA	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
ECJ	European Court of Justice
EU	European Union
Framework	United Nations 'Protect, Respect and Remedy' Framework
GPs	United Nations Guiding Principles for Business and Human Rights
Guidelines	OECD Guidelines for Multinational Enterprises
Ibid.	Ibidem (in the same place)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labour Organization
ILO Declaration	The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
Malabo Protocol	African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
NCPs	National Contact Points
NGO	Non-governmental organisation
Norms	United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights
p./pp.	page/pages
para./paras.	paragraph/paragraphs

TNC/TNCs	Transnational corporation(s)
UDHR	Universal Declaration on Human Rights
UK	The United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNGA	General Assembly of the United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
Zero Draft	Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, OEIGWG chairmanship revised draft of 16 July 2019

Introduction

Transnational corporations (TNCs) are a phenomenon born from globalisation. As markets become increasingly open to foreign investors, business corporations are able to continually expand their activities and diversify their subsidiaries. Those who manage to grasp the opportunities beyond national borders can reap great profits, but also immense economic, social and political power. As stated by Tony Blair in 2007, '[b]*usiness gets involved in politics, not as partisans of a political party, but as important actors in global debate.*'[1] The power of TNCs is especially palpable in developing countries, whose development largely depends on foreign direct investment.[2] As TNCs became the agents of economic and social development, they also gained significant impact on the enjoyment of human rights in places of their operations. The rapid growth of global markets, which brought change in the distribution of power on the international field, however, has not been followed by equally fast globalisation of law and policy.[3] The power of transnational business to influence, among other things, the enjoyment of human rights, is therefore not followed by corresponding responsibility. As the markets are international and the law is still principally national, the governance gap is yet to be filled.[4]

In 2012, the United States Supreme Court was hearing arguments in the landmark case of *Kiobel et al. v. Shell*.[5] Shell was accused of acts violating human rights of Nigerian nationals, including torture and extrajudicial killings. The counsel for Shell stated: '*is there any source in customary international law throughout the world that holds corporations liable for the human*

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[1] Stephen J Korbin, 'Globalization, transnational corporations and the future of global governance' in Andreas G Scherer and Guido Palazzo (eds), *Handbook of Research on Global Corporate Citizenship* (Edward Elgar Publishing Limited 2008), p. 253.

[2] Ann-Sofie Isaksson and Andreas Kotsadam, 'Racing to the bottom? Chinese development projects and trade union involvement in Africa' [2018] World Development vol. 106, issue C, 284, p. 284; Menno T Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law* (Kluwer Law International 2000), p. 2; Pavel Šturma and Vladimír Balaš, *Mezinárodní ekonomické parvo* (2nd ed., C. H. Beck 2013), p. 137.

[3] ILO World Commission on the Social Dimension of Globalization, 'A Fair Globalization: Creating Opportunities for All' (International Labour Office 2004), p. xi.

[4] Korbin (*supra* note 1), p. 249; John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton 2013), p. 7 in pdf; Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' [2002] 20 Berkeley J. Int'l L., 45, p. 54.

[5] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); also see p. 42 below.

rights offenses alleged here? And the answer is there is none.'[6] Indeed, so far there has been little success in holding TNCs to account under international law, customary and treaty-based alike. As international human rights law evolved in the context of the Westphalian system of sovereign states, it is also the states who had originally been under the obligation to respect human rights. As this system still forms the basis of international law today, the gap in regulation of TNCs with respect to human rights should, arguably, be overcome through national law. However, while it is states who have a general duty to protect human rights, including a duty to protect them against business-related abuses, they can, for many reasons, be unable or unwilling to do so. Due to the inability of international and national law to effectively address the instances of corporate acts which have adverse impacts on human rights, a considerable body of soft law gradually developed on the floor of international organisations. These instruments are encouraging businesses to accept their social responsibility. Although they do not contain legally binding rules, they create what the UN Special Representative for business and human rights, Professor John Ruggie, calls 'social norms'.[7] According to Ruggie, these social norms are capable of inducing change where *lex lata* is not available or is not being enforced.[8]

The main objective of this paper is to explore why, after decades of discussions about the impact that transnational business has on human rights, gross business-related human rights violations are still happening and rarely are there any serious consequences for the perpetrator. This paper will examine the possible accountability mechanisms currently in theory offered in cases of adverse impacts of transnational business on human rights. The intention behind this endeavour is to identify why is responsibility of TNCs so difficult to achieve. While focusing on international law, consideration is also given to current alternatives to international regulation offered in the countries of the corporations' operations as well as in the countries of their incorporation. Lastly, some focus is put on already existing soft law rules on corporate social responsibility and their potential to provide an effective alternative to binding instruments of international law.

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[6] Andrew Clapham, 'Human Rights Obligations for Non-State-Actors: Where are We Now?' in Fannie Lafontaine and François Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia 2018), p.21.

[7] John G Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' Corporate Responsibility Initiative Working Paper No. 67 (John F. Kennedy School of Government, Harvard University 2017), p. 13.

[8] *Ibid.,* pp. 13-14.

1. Methodology

1.1. Research questions, methods and structure

This paper is divided into four chapters, which all (except this Chapter 1) reflect one research question posed hereunder. Chapter 1 is dedicated to defining the research questions and delimiting the boundaries of research. It further provides definitions of the key terminology used in this thesis. Specifically, it elaborates on the term 'transnational corporation', the difference between 'responsibility' and 'liability' in international and national law and the concept of human rights in international law with special focus to human rights in relation to business.

The need for an effective regulation of international business and human rights has been a topic resonating strongly in the international debate in the past three decades.[9] In this regard, some have suggested that the obligations of states under existing international human rights law should be extended to TNCs.[10] Others are advocating for a new binding international treaty that would impose direct human rights obligations upon corporations.[11] Yet, many are of the view that TNCs should be held to account under national law and international law does not need to be directly engaged.[12] Either way, the existence of such lively debate on this topic shows that there is a strong perception of a need for change. This paper was initially inspired by this debate and seeks to identify the gaps and loopholes in legal regulation to provide better understanding of which ways forward are feasible and under what circumstances. Chapter 2 is concerned with the duty of TNCs to respect human rights. It examines whether such obligation exist in *lex lata* public international law and in doing so, it poses this question:

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[9] John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton 2013), p. 8 in pdf.

[10] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' [2002] 20 Berkeley J. Int'l L., 45, p. 73; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press 2006), pp. 68-69; Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' <http://esil-sedi.eu/wp-content/uploads/2018/04/Nowrot.pdf> accessed 27 June 2019, pp. 7-11.

[11] UN Human Rights Council, Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 24 January 2018, A/HRC/37/67, para. 19; see also Peter T Muchlinski, 'Human Rights and Multinationals: Is There a Problem?' in David Kinley (ed), *Human Rights and Corporations* (Routledge 2017), p. 38; Connie de la Vega, 'International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It' [2017] 51 U.S.F. L. Rev. 431, p. 468.

[12] The International Chamber of Commerce and the International Organisation of Employers, 'Joint views of ICC and the IOE on the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" submitted to the United Nations Commission on Human Rights' (1 March 2004) <reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc> accessed 19 December 2019, pp. 3-4.

What are the current obstacles to holding TNCs responsible for human rights abuses under public international law?

In answering this question, Chapter 2 uses conceptual analysis of legal personality in public international law. It also provides comparative analysis of the status of corporations under both international human rights law and international criminal law. Moreover, it studies whether international criminal law is capable of providing the enforcement tool missing in international human rights law.

Although the title of this paper is 'Responsibility of Transnational Corporations for Human Rights Violations under International Law', analysis of national accountability mechanisms is an important component of this paper. It is the shortcomings of national law that are used as an argument necessitating international regulation of TNCs. The research question reflected in Chapter 3 is therefore:

Can TNCs be held accountable for human rights abuses on the national level?

Accordingly, Chapter 3 focuses on the state duty to protect human rights and provide victims of human rights abuses with access to effective remedies. It seeks to describe why states are falling short of effectively preventing human rights abuses committed by TNCs. As to the access to remedy, Chapter 3 provides a comparative analysis of recent caselaw from selected common law and civil law jurisdictions to determine whether victims of transnational human rights abuse have effective recourse available to them.

Lastly, the analysis of the relationship between business and human rights would not be complete without the evaluation of the most significant soft law instruments adopted by international organizations. Chapter 4 is descriptive in its character as it maps these selected soft law instruments, namely the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles for Business and Human Rights. Ultimately, Chapter 4 aspires to answer the following:

Can the accountability mechanisms offered by existing international soft law instruments on corporate social responsibility fill the gaps in legal regulation of TNCs?

1.2. Research limitations

The topic of responsibility of transnational business for violations of human rights is potentially very broad and worthy of more space than this thesis can offer. This paper thus does not aim at covering all the aspects possibly connected to it. Firstly, it is not concerned with the possible attribution of the acts of TNCs to states under customary international rules, as laid down in the International Law Commissions' Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Some relevant conduct of corporations may be carried out in exercise of governmental authority, upon instructions, direction or control of a state, or acknowledged and adopted by a state and thus give rise to state responsibility. This thesis, however, focuses solely on the responsibility of the TNCs themselves, which may be triggered independently as well as parallelly to state responsibility.

Secondly, it is not the aim of this paper to provide an in-depth analysis of the material content of different human rights obligations. The underlying concept of human rights is to be found in subsection 1.3.3. of this Chapter and the description of human rights specifically susceptible to infringement by TNCs is provided throughout this paper. As this paper examines consequences of such acts, i.e. responsibility and possibilities of holding TNCs to account for such violations, it is presumed that such responsibility would be triggered by behaviour of TNCs having severe negative impact on human rights as recognized in the various international covenants and treaties.

Lastly, this paper does not examine the possible responsibility of TNCs for human rights violations stemming from international investment agreements. Although counterclaims in international investment arbitration may, in certain limited circumstances, offer a new forum for establishment of responsibility of TNCs for human rights violations, the procedural aspects of such notion have already been thoroughly examined in another master's thesis[13] and will not be discussed hereunder.

[13] Nikola Klímová, 'Host-State Counterclaims in Investment Arbitration: Holding Investors Accountable for Human Rights Violations' (master's thesis, Charles University 2018).

1.3. Terminology

1.3.1. Characterization of transnational corporations

Some scholars differentiate between multinational and transnational corporations, although the terms are frequently used interchangeably. The term 'multinational corporation' was first used in 1960 by David E Lilienthal.[14] He defined multinational corporations as those '*which have their home in one country but which operate and live under the laws and customs of other countries as well*'.[15] Economists such as Richard E Caves define a multinational enterprise as '*an enterprise that controls and manages production establishments - plants - located in at least two countries*'.[16] This definition, which bestows on multinational corporations a managerial control rather than just financial stake, indicates that multinational companies engage in foreign direct investment (as opposed to portfolio investments).[17] With regard to nationality, multinational corporations are sometimes described as parent companies with one nationality having subsidiaries in multiple other countries.[18]

A 'transnational corporation', on the other hand, could be distinguished by a higher level of decentralization.[19] The United Nations defines it as:

> *an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.*[20]

Even the United Nations' interpretation of the terms 'multinational' and 'transnational' has developed in time. The distinction formerly made between the two seems to have vanished and the

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[14] Peter T Muchlinski, *Multinational Enterprises & the Law* (2nd ed., Oxford University Press 2007), p. 5.

[15] David K Fieldhouse 'The Multinational: A Critique of a Concept' in Alice Teichova *et al.* (eds), *Multinational Enterprises in Historical Perspective* (Cambridge University Press 1986) 10; Muchlinski (*supra* note 14), p. 5.

[16] Richard E Caves, *Multinational Enterprise and Economic Analysis* (Cambridge University Press 1982), p. 1; see also Neil Hood and Stephen Young, *The Economics of the Multinational Enterprise* (Longman 1979), p. 3.

[17] Muchlinski (*supra* note 14), p. 5.

[18] Pavel Šturma and Vladimír Balaš, *Mezinárodní ekonomické právo* (2nd ed., C. H. Beck 2013), p. 137.

[19] *Ibid.*; see also Pierre-Yves Saunier, "Transnational" in Akira Iriye and Pierre-Yves Saunier (eds), *The Palgrave Dictionary of Transnational History* (Palgrave Macmillan UK 2009), p. 1051.

[20] Un Sub-Commission on The Promotion and Protection of Human Rights (55th Session) Agenda item 4, 'Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) E/CN.4/Sub.2/2003/12/Rev.2, para 20.

term ‘transnational corporation’ is used to cover all types and forms of cross-border enterprises.[21] What seems to be the main indicator of a transnational corporation is the ability of the entity in question to coordinate business activities between enterprises in more countries.[22]

The reason why TNCs deserve special attention and regulation distinct from domestic companies is, according to Muchlinski, that they create different problems in economic policy. The causes of the different policy issues are hidden in the fact that TNCs have the ability to distribute production across borders, utilize their know-how in foreign markets through their affiliates without having to sell it and the ability to organize their managerial structure on a global level.[23] With respect to human rights, TNCs have a specific position due to their immense market power. As further elaborated in Chapter 3 below, TNCs have dominated the foreign direct investment worldwide[24] and thus may significantly influence the enjoyment of certain human rights[25] as well as the local regulatory standards.[26] That applies to developing and developed countries, although developing countries are arguably more vulnerable as they depend on TNCs’ investment capital. This factor is coupled with problems with uncovering the corporate structure, which may be spread across jurisdictions with differing corporate law regulations. Therefore, when a TNC is implicated in human rights abuses, the corporate veil reinforced by its transnationality poses a potential obstacle to finding the true perpetrator and providing the victims with access to judicial remedies. In light of these distinct problems created or augmented by the transnationality of TNCs and the resulting need for a distinct targeted regulation, this paper focuses specifically on TNCs rather than any and all business corporations.

Ultimately, however, drawing the line of where a TNC ends is bound to encompass some arbitrariness.[27] For the purposes of this paper, the term ‘transnational corporation’ is intended to serve as an umbrella term, encompassing any commercial entity that engages in business activities

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[21] Muchlinski (*supra* note 14), p. 6.

[22] Luigi Chiarella, ‘Human Rights and Transnational Companies: Responsibility without Accountability’ [2014] 4 Bocconi Legal Papers 185, p. 187.

[23] Muchlinski (*supra* note 14), p. 8.

[24] Larissa van den Herik and Jernej L Černič, ‘Regulating Corporations under International Law’ [2010] 8 J Int'l Crim Just 725, pp. 725-726.

[25] Predominantly labour rights, rights connected to the environment or rights of indigenous peoples, see section 1.3.3. below.

[26] See pp. 34-35 below.

[27] Muchlinski (*supra* note 14), p. 7.

in more than one country at a time. Such entity's model may range from a very decentralized TNC which consists of relatively self-sufficient companies operating in different host countries, to an entity centred around one parent in a home country, with uniform business strategy in all of its host countries. What unites these types of TNCs is their transnationality as to their operations, customer base and/or supply chains.[28] The differences in governance structures are, in the end, not as significant when considering potential human rights obligations of such entities, as they would be for other considerations.[29]

1.3.2. Responsibility and liability

Differentiating between 'responsibility' and 'liability' is specific to English language, as other languages offer only one word for both.[30] International responsibility, moreover, is distinctive, not identical to responsibility in national law.[31] It is therefore necessary to provide a short explanation of these terms at this point, as this thesis describes responsibility and liability in both the national and the international context.

International responsibility of states is neither of purely criminal, nor civil nature[32] as it combines elements of both. It aims to both satisfy the injured party and to sanction the perpetrator in favour of the international community as a whole.[33] Although the concept of international responsibility used to be inseparably connected to an obligation of reparation of damage,[34] this approach seems to have been abandoned. The currently most accepted definition of international responsibility describes it as a new legal relationship resulting from an internationally wrongful

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[28] Denis G Arnold, 'Corporations and Human Rights Obligations' [2016] Business and Human Rights Journal, vol. 1, 255, p. 257.

[29] *Ibid.*

[30] E.g. French ('*responsabilité*'), Spanish ('*responsabilidad*'), Italian ('*responsabilità*'), Czech ('*odpovědnost*').

[31] Alain Pellet 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010), p. 3.

[32] Pellet (*supra* note 31), p. 13; see also Roberto Ago, Third Report on Stare Responsibiliry 'The internationally wrongful act of the State, source of international responsibility' in ILC Yearbook 1971, Vol. II pt. 1, 199, p. 209, para 38.

[33] Pellet (*supra* note 31), pp. 13-14.

[34] *Ibid.*, p. 5.

act.[35] Article 1 ARSIWA states that: '*Every internationally wrongful act of a State entails the international responsibility of that State.*' State responsibility therefore arises when there is an act attributable to the state which breaches the state's international obligation.[36] It follows that damage is no longer a *conditio sine qua non* of international responsibility.[37] Moreover, responsibility of states for internationally wrongful acts must be distinguished from responsibility under international criminal law. Although some acts may trigger both of these consequences, they are each breaching a different legal obligation.[38] Even the ICJ recognized that this '*duality of responsibility continues to be a constant feature of international law.*'[39]

Liability in international law refers to strict liability, which arises from a harmful consequence of an act not prohibited by norms of public international law, but potentially dangerous.[40] It can be established by an international treaty,[41] or result from an international principle.[42] Unlike in the above described case of international responsibility of states, existence of damage (together with risk) is a necessary precondition of the *sine delicto* liability.[43] It remains to be mentioned that events giving rise to liability are rare also because when there is a simultaneous state obligation of prevention, breaching such obligation results in responsibility.

Turning to the meaning of 'responsibility' and 'liability' in domestic law, the Anglo-American legal language does not draw a line nearly as strict as is drawn in public international law. To the contrary, the words are at many times used interchangeably. As *Sir Salmond* describes: '[l]*iability or responsibility is the bond of necessity that exists between the wrongdoer and the*

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[35] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001] Yearbook of the International Law Commission 2001, vol. II, Part Two (United Nations 2008), p. 31 para 1.

[36] see International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* as adopted by the UN General Assembly Res. 56/83, *Responsibility of States for internationally wrongful acts* (28 January 2002), A/RES/56/83, Art. 2.

[37] Pellet (*supra* note 31), p. 9.

[38] Roger O'Keefe, *International Criminal Law* (1st ed., Oxford University Press 2015), p. 79.

[39] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro]), Judgment, ICJ Rep. 2007, 43, para 173.

[40] Pellet (*supra* note 31), p. 10.

[41] e.g. Article VII of The Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 27 January 1967, 601 U.N.T.S. 205.

[42] Pellet (*supra* note 31), p. 10.

[43] *Ibid.*, p. 12.

remedy of the wrong.'[44] The Black's Law Dictionary defines liability as '*legal responsibility to another or to society, enforceable by civil remedy or criminal punishment*'.[45] The only subtle difference that can be inferred from this definition is that 'responsibility' is a broader term, not limited to legal context, while 'liability' is its legal subcategory. Accordingly, 'responsibility' is defined as '*being duty-bound*',[46] while 'liability' is defined as '*being legally obligated*'.[47]

Moreover, the UN Guiding Principles for Business and Human Rights discussed in Chapter 3 below use the term 'corporate responsibility' to respect human rights. According to the author, Professor Ruggie, the term 'responsibility' was used intentionally to indicate a broader normative framework.[48] Specifically, it was chosen to signal that the duties in question stem not only from legal norms, but also from social norms, i.e. the '*nonstate-based social or civil system grounded in the relations between corporations and their external stakeholders*'.[49]

This paper follows this delimitation of the two terms. When discussing responsibility under public international law, it adheres strictly to the terminology used by the International Law Commission in ARSIWA. Conversely, when referring to domestic law and civil liability lawsuits, it is more benevolent with the terms, preferring the use of the term liability as a legal subcategory of responsibility. Lastly, when discussing the UN Guiding Principles for Business and Human Rights, the terminology chosen therein is followed in this paper.

1.3.3. The concept of human rights and its relation to business operations

The concept of human rights has its firm roots in Christian morality and social practices.[50] This paper, however, aims at a legal analysis and therefore approaches the concept from a positivist legal perspective. Even so, it is hard to clearly define human rights. The scope of human rights in different international instruments and priorities of different states vary and evolve in time, making

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[44] John W Salmond and Glanville L Williams, *Salmond on Jurisprudence* (10th ed., Sweet & Maxwell 1947), p. 396.

[45] 'liability' in Bryan A Garner (ed), *Black's Law Dictionary* (11th ed., Thomson Reuters 2019).

[46] 'responsibility' in Bryan A Garner (ed), *Black's Law Dictionary* (11th ed., Thomson Reuters 2019).

[47] 'liability' in Bryan A Garner (ed), *Black's Law Dictionary* (11th ed., Thomson Reuters 2019).

[48] John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton 2013), pp. 97-98 in pdf.

[49] *Ibid*., p. 97 in pdf.

[50] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd ed., Oxford University Press 2014), p. 3.

a consensus on a clear unambiguous definition difficult.[51] Nonetheless, deriving from the varied legal doctrine and practice, Tomuschat finds a common denominator in that '[h]*uman rights are rights intimately connected to human existence in dignity and freedom.*'[52]

In positive law, '[i]*nternational human rights are those human needs that have received formal recognition as rights through the sources of international law*'.[53] Therefore, international human rights can be identified by analysing international human rights instruments.[54] The Universal Declaration of Human Rights (UDHR) unanimously adopted by the UN General Assembly in 1948 to prevent a recurrence of the atrocities of the Second World War in its thirty articles proclaims a variety of rights, ranging from the right to life, liberty and security of person[55] to the right to education,[56] or the right to participate in the cultural life of the community.[57] Since the adoption of the UDHR, international covenants and treaties have significantly broadened the catalogue, giving rise to two major categories: the civil and political rights and socio-economic rights.[58]

Civil and political rights, i.e. the first two generations of human rights, found their codification in the ICCPR. The ICCPR contains provisions unifying the human rights standards on the international level, containing provisions on rights such as the right to a fair trial[59] or the freedom of thought, conscience and religion.[60] . There are, however, certain rights contained in the ICCPR, which are stemming from *ius cogens* and are only solidified by the ICCPR. Specifically, it is the right to life,[61] and human dignity (prohibition of torture or to cruel, inhuman or degrading

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[51] Lucy Kronforst 'Transnational Corporations and Human Rights Violations: Focus on Colombia' [2005] 23 Wis. Int'l L.J. 321, p. 322; for example in the field of sexual and reproductive health and rights, which are promoted by the EU as human rights, there is a strong backlash by the US, Brazil, Russian Federation and many other states.

[52] Tomuschat (*supra* note 50), p. 4.

[53] Stephen Marks, 'Emerging Human Rights: A New Generation for the 1980s?' [1981] 33 Rutgers Law Review 435, p. 436.

[54] Marc Bossuyt, *International Human Rights Protection: Balanced, Critical, Realistic* (Intersentia 2016), p. 8.

[55] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), Art 3.

[56] *Ibid.*, Art 26.

[57] *Ibid.*, Art 27(1).

[58] Bossuyt (*supra* note 54), p. 8.

[59] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171., Art 14.

[60] *Ibid.*, Art 18.

[61] *Ibid.*, Art 6.

treatment or punishment[62] and slavery and servitude[63]).[64] The economic, social and cultural rights were codified in the ICESCR. Contrary to the ICCPR, the ICESCR is of a rather proclamatory nature, leaving its implementation upon states and having in mind their differing economic capacities.[65] These proclamatory provisions contain, for example, the right to employment[66] and health.[67] Some rights are, nonetheless, formulated as specific obligations of states. These include for example the obligation to ensure the right to form and join trade unions,[68] or to criminally prosecute child labour[69].[70]

It must also be noted that there are human rights which are as to their existence, or at least as to their extent, disputable. For instance, the right to a healthy environment, although increasingly acknowledged, has not been included in any universal human rights treaty or declaration.[71] Nonetheless, UN treaty bodies, regional tribunals and other human rights mechanisms have viewed environmental issues through a human rights lens.[72]

When linking human rights to business, defining the scope of human rights does not get any easier. While drafting the UN General Principles on Business and Human Rights, Professor Ruggie opted to refer to '*internationally recognized human rights*' as the rights which must be respected by business enterprises.[73] These include at the least:

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[62] *Ibid.*, Art 7.

[63] *Ibid.*, Art 8.

[64] Čestmír Čepelka and Pavel Šturma, *Mezinárodní parvo veřejné* (1st ed., C. H. Beck 2008), pp. 408-409.

[65] *Ibid.*, p. 407.

[66] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 U.N.T.S. 3, Art 7.

[67] *Ibid.*, Art 12.

[68] *Ibid.*, Art 8.

[69] *Ibid.*, Art 10(3).

[70] Čepelka and Šturma (*supra* note 64), p. 704.

[71] John H Knox and Ramin Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press 2018), pp. 1-2.

[72] *Ibid.*, p. 2.

[73] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011), A/HRC/17/31, p. 13, principle 12.

> *those* [human rights] *expressed in the International Bill of Human Rights*[74] *and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.*[75]

Ruggie, however, went beyond this minimal benchmark and suggested that, depending on the circumstances, business enterprises may need to take into account additional standards, such as the rights of indigenous peoples, women, national or ethnic, religious and linguistic minorities, children, persons with disabilities and migrant workers and their families.[76] Additionally, corporations operating in conflict zones should respect the standards of international humanitarian law.[77]

In practice, human rights potentially susceptible to corporate abuse include both civil and political, as well as economic, social and cultural rights. Considering the most common mode of operation of TNCs, some of the most adversely impacted human rights fall in the category of labour rights.[78] These abuses may include the use of forced and child labour, violations of the right to associate and form unions as well as poor safety and health conditions at the workplace. Also common on the list of corporate wrongdoings is environmental damage[79] and the associated land-grabbing and the displacement of indigenous peoples. TNCs have also been implicated in supporting governments that violate human rights of their own citizens.[80]

This paper does not aim at extensive analysis of the material content of individual human rights potentially susceptible to corporate abuse. Rather, the focus of this thesis is put on the consequence of such abuse, i.e. responsibility of TNCs. Unless further specified otherwise, it is therefore presumed that such responsibility would be triggered by an act or omission, which has an adverse impact on human rights recognized and protected by the respective legal framework.

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[74] *i.e.* the UDHR, the ICCPR and the ICESCR.

[75] 2011 Report of the SR (*supra* note 73), p. 13, principle 12.

[76] *Ibid.,* p. 14.

[77] *Ibid.*

[78] David S Bettwy, 'The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for An Analytical Framework' [2012] 11 Rich. J. Global L. & Bus. 239, pp. 242-243.

[79] *Ibid.*; See for example *Union Carbide gas plant disaster at Bhopal*, 634 F.Supp. 842 (S.D.N.Y. 1986).

[80] See for example *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 113 (2013).

2. Obstacles to direct responsibility of transnational corporations under public international law

To understand why TNCs cannot *de lege lata* bear human rights obligations under international law, the notion of international legal personality must firstly be examined. International law is specific in this regard, as it has no centralized law of persons.[81] The specification of legal personality in international law is therefore inferred from considerations of the nature of international law and the role states and other entities play in it.[82] This concept of legal personality (or international personality) may be traced to the second half of the nineteenth century[83] and refers to '*the capacity to be the bearer of rights and duties under international law*'.[84] This approach to legal personality in international law, dominant in legal theory,[85] therefore gives subjects of international law certain ability to carry rights and obligations and also to bring claims in order to maintain these rights. Under the traditional positivist doctrine, subjects of international law are individual sovereign states.[86] They are the 'traditional' subjects of international law because they have been the principal actors on the international scene from the very beginning.[87]

The more recent state of affairs on the international scene, however, requires other actors to be given the capacity to bear international rights and obligations, albeit in a limited manner. According to established doctrine, international legal personality requires a sort of wide acceptance in the form of conferral of rights and obligations by states under international law.[88] These obligations need to be conferred directly onto the subject by a norm of international, not

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[81] Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010), p. 9.

[82] *Ibid.*

[83] Rose Parfitt, 'Theorizing Recognition and International Personality' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), p. 583.

[84] James Crawford, *The Creation of States in International Law* (2nd ed., Oxford University Press 2006), p. 32; see also Čestmír Čepelka and Pavel Šturma, *Mezinárodní parvo veřejné* (2nd ed., C. H. Beck 2018), p. 34.

[85] Jan Ondřej 'Vybrané otázky mezinárodní ochrany lidských práv ve vztahu k právnickým osobám, zejména k nadnárodním (transnacionálním) společnostem' in Pavel Šturma and Martin Faix (eds), *Lidskoprávní dimenze mezinárodního práva* (Univerzita Karlova v Praze, Právnická fakulta 2014), p. 49.

[86] James Crawford, *Brownlie's principles of public international law* (8th ed., Oxford University Press 2012), p. 116.

[87] Antonio Cassese, *International Law* (2nd ed., Oxford University Press 2005), p. 71.

[88] Sir R Jennings and Sir A Watts, *Oppenheim's International Law, Vol. I, Introduction and Part 1* (9th ed., Longman Group UK Limited 1992), p. 16; Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' <http://esil-sedi.eu/wp-content/uploads/2018/04/Nowrot.pdf> accessed 27 June 2019, p. 4.

national law.[89] Entities widely accepted by states to have limited international legal subjectivity include international organizations,[90] entities legally proximate to states,[91] some *sui generis* entities[92] or peoples with a right to self-determination.[93] Even natural persons are given international subjectivity in so far as they enjoy protection of human rights or of their investments,[94] or when they face international criminal culpability.[95]

When it comes to TNCs, their significant influence on contemporary international affairs can hardly be overlooked. Nonetheless, treating them as subjects of public international law is a controversial issue.[96] To clarify, there is little controversy surrounding the capacity of corporations to bear certain rights under international law, such as rights stemming from international investment agreements or the right to a fair trial and property rights.[97] When it comes to obligations, however, there is not much evidence to support claims of already existing and fully developed international legal personality of corporations.[98] Nevertheless, certain recent developments suggest that there might be potential for change.[99] This Chapter examines the capacity (or rather lack thereof) of TNCs to be responsible for human rights abuses under both international human rights treaty law and international criminal law. This Chapter, moreover, describes recent developments in international field which indicate the willingness of some states to overcome the obstacle of the lack of legal personality of TNCs in order to ensure accountability.

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[89] Ondřej (*supra* note 85), p. 49.

[90] Crawford (*supra* note 86), p. 120.

[91] *Ibid.*, p. 117.

[92] Cassese (*supra* note 87), p. 124.

[93] Donald K Anton, Penelope Mathew, Wayne Morgan, *International Law: Cases and Materials* (Oxford University Press 2005), p. 129.

[94] Crawford (*supra* note 86), p. 121.

[95] Cassese (*supra* note 87), p. 144.

[96] Debosmita Nandy and Niketa Singh, 'Making Transnational Corporations Accountable for Human Rights Violations' [2009], 2 NUJS L. Rev. 75, p. 79; Ondřej (*supra* note 85), p. 50.

[97] Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press 2006), pp. 80-81.

[98] Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities', p. 6 <http://esil-sedi.eu/wp-content/uploads/2018/04/Nowrot.pdf> accessed 27 June 2019; see also Markus Krajewski, 'The State Duty to Protect against Human Rights Violations through Transnational Business Activities' [2018] 23 Deakin L. Rev. 13, p. 17.

[99] See section 2.2. below.

2.1. Corporations as subjects of international human rights treaty law

Most human rights have their origin in international treaties.[100] Contrary to customary norms of international criminal law, international treaties are not focused on imposing duties on individuals. Rather, they are designed to protect their rights.[101] Where such treaties establish mechanisms of review, the aggrieved individual has a direct right to file for remedy without the involvement of the home state.[102] In such capacity, the legal personality of an individual is hardly disputed. Questions, however, arise as to the range of subjects bound by the international human rights treaties. For a long time, the one dominant threat to individual beings was the state.[103] Up until the end of the Second World War when the United Nations was founded and its human rights protections were established, nation-states had only few rivals.[104] Therefore, the explicit mentions of duties of non-state actors, if any, are somewhat sporadic and inconsistent.

For instance, the Universal Declaration of Human Rights states that '[e]*veryone has duties to the community in which alone the free and full development of his personality is possible.*'[105] Both the ICCPR and the ICESCR have included a statement in their preambles '[r]*ealizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized*' in the respective Covenant.[106]

The regional human rights regimes are also very inconsistent on this issue. The African Charter on Human and Peoples' Rights is the most exhaustive, containing an entire chapter titled 'Duties'[107] including a list of individual's obligations towards other individuals and society as a

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[100] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd ed., Oxford University Press 2014), p. 112.

[101] Cassese (*supra* note 87), p. 146.

[102] Tomuschat (*supra* note 100), p. 113.

[103] *Ibid.*, p. 119.

[104] Our Global Neighborhood: The Report of the Commission on Global Governance, Chapter 1, para 9 <http://www.gdrc.org/u-gov/global-neighbourhood/chap1.htm> accessed 4 July 2019; Paul Redmond, 'Transnational Enterprise and Human Rights: Options for Stan- dard Setting and Compliance' [2003] 37 INT'L LAW 69, p. 76.

[105] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), Art 29(1).

[106] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171, Preamble para 6; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 U.N.T.S. 3, Preamble para 6.

[107] African Charter on Human and Peoples' Rights (27 June 1981) 1520 U.N.T.S. 217, Arts 27-29.

whole. The American Convention on Human Rights simply states that '[e]*very person has responsibilities to his family, his community, and mankind*.'[108] The ASEAN Human Rights Declaration notes that '*all rights must be balanced with the performance of corresponding duties*[...]'[109] and finally the European ECHR is silent as to any duties of individuals,[110] possibly due to its nearly 70 years of age. All these provisions, however, are very broad and thus not realistically enforceable. As Professor *Tomuschat* notes, they are rather political statements reminding everyone that the community rests on the voluntary cooperation of individuals.[111]

2.2. Possibility of redesigning the approach to business and human rights

As described in the previous section, corporations are not endowed with legal personality under international human rights law and cannot, under the current paradigm, be responsible for not respecting human rights of others. The leading argument in favour of redesigning this current approach to international legal personality seems to be that international law should reflect the needs of the community.[112] This follows from the fact that the sole existence of international law is to ensure stability and peace[113] as a communal interest. In order to achieve this goal, the law needs to remain 'effective'[114] and 'realistic'.[115] As power is no longer vested exclusively in individual states, international law must adjust to these changes. Professor Charney explains: '*Nation-states aside, TNCs are the most powerful actors in the world today and to not recognize that power would be unrealistic*.'[116] In this regard, Muchlinski suggests that states can 'appeal to

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[108] Organization of American States, American Convention on Human Rights (22 November 1969) 1144 U.N.T.S. 123, Art 32(1).

[109] Association of Southeast Asian Nations, ASEAN Human Rights Declaration, 18 November 2012, Principle 6.

[110] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd ed., Oxford University Press 2014), p. 129.

[111] Tomuschat (*supra* note 100), p. 130.

[112] Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities', pp. 7-8 <http://esil-sedi.eu/wp-content/uploads/2018/04/Nowrot.pdf> accessed 27 June 2019.

[113] *Ibid,* p. 7 citing Philip C Jessup 'The Subjects of a Modern Law of Nations' [1947] 45 Michigan Law Review 383, p. 384; Rosalyn Higgins 'International Law in a Changing International System' [1999] 58 Cambridge Law Journal 78, p. 95.

[114] Nowrot (*supra* note 112), p. 8.

[115] *Ibid.,* citing Antonio Cassese, *International Law* (2nd ed., Oxford University Press 2005), p. 12.

[116] Jonathan I Charney, 'Transnational Corporations and Developing Public International Law' [1983] Duke Law Journal 748, p. 768.

pragmatism' and introduce positive legal obligations to observe fundamental human rights into international treaties addressed directly to TNCs.[117]

This appeal to rethink the approach to corporate human rights obligations is not coming only from the academic circles. In terms of global developments towards corporate responsibility in international human rights law, the most significant one came in 2014 from the initiative of Ecuador and South Africa on the floor of the UN Human Rights Council. The Council established the Open-ended Intergovernmental Working Group (OEIGWG) with a mandate '*to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*.'[118] This effort of certain states to achieve regulation of TNCs is the last one of many such efforts[119] and is supported mainly by countries of the Global South. Since the establishment of the OEIGWG, a 'Zero Draft' of the proposed treaty on business and human rights[120] has been published and regularly updated by its chairperson, most recently in July 2019.[121]

The proposed Zero Draft is a very novel concept. It proposes a treaty, which would include obligations of both states and business enterprises. Although the wording of the Zero Draft would impose the obligation to respect human rights upon TNCs, it is still mainly focused on states. It is either worded passively, stating that 'victims shall' be treated in a certain way, be protected etc, or that 'victims shall be guaranteed' something.[122] Conversely, when establishing obligations explicitly directed at states, the Zero Draft is relatively clear. It, for example, provides that states should investigate all human rights violations[123] or provide proper and effective legal assistance

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[117] Peter T Muchlinski, 'Human Rights and Multinationals: Is There a Problem?' in David Kinley (ed), *Human Rights and Corporations* (Routledge 2017), p. 38.

[118] UN Human Rights Council Res. 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (14 July 2014), A/HRC/RES/26/9, p. 2, para. 1.

[119] Pavel Šturma, 'Human Rights and International Investment Law' in Pavel Šturma and Vinícius Almada Mozetic (eds), *Business and Human Rights* (rw&w Science & New Media Passau-Berlin-Prague 2018), pp. 22-23.

[120] officially 'the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises'.

[121] See UN Human Rights Council, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Zero Draft)' (16 July 2019) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 22 January 2020.

[122] See *Ibid.*, Art 4.

[123] *Ibid.*, Art 4(10).

to victims.[124] Emphasis is also put on the state obligation of prevention.[125] The Zero Draft also distinguishes between 'violations' of human rights by states and 'abuse' of human rights by business.[126]

What seem problematic is, however, the exact scope of the proposed obligations. The Zero Draft simply states that '[t]*his (Legally Binding Instrument) shall cover all human rights.*'[127] It is, however, not clear which human rights are 'all human rights'. Some rights have not been recognized as human rights by all states[128] and some treaties have not been ratified by all states,[129] leaving the proposed scope of the treaty very ambiguous. Although the proposed Preamble of the Zero Draft recalls '*nine core International Human Rights Instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labour Organization*',[130] it was criticized as not all states chose to ratify these instruments.[131] The Zero Draft then defines 'human rights violations or abuse' as:

> *any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional*

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[124] *Ibid.*, Art 4(12).

[125] *Ibid.*, Art 5.

[126] UN Human Rights Council, Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 9 January 2020, A/HRC/43/55, Annex III, para 1.

[127] Zero Draft (*supra* note 121), Art 3(3).

[128] For example, the right to a healthy environment has never been recognized on the global level in any universal human rights treaty see John H Knox and Ramin Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press 2018), pp. 1-2.

[129] For example, the US have signed, but not ratified the ICESCR see UN Treaty Collection, International Covenant on Economic, Social and Cultural Rights <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 22 January 2020; the same goes for the CEDAW see UN Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4> accessed 22 January 2020; many states have also not signed and/or ratified the International Convention for the Protection of All Persons from Enforced Disappearance see UN Treaty Collection, International Convention for the Protection of All Persons from Enforced Disappearance <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4> acessed on 22 January 2020.

[130] Zero Draft (*supra* note 121), Preamble, para 2.

[131] Report on the fifth session of OEIGWG (*supra* note 126), p. 6, para 24.

suffering, economic loss or substantial impairment of their human rights, including environmental rights.[132]

This broad formulation provoked some states and business organizations to suggest that such vague definition might conflict with the principle of legality.[133] Moreover, in terms of enforcement of the proposed treaty, the Zero Draft currently assigns adjudicative jurisdiction over future violations of the proposed treaty to national courts.[134] In absence of any clear definitions, the interpretation of the treaty would therefore be in the hands of national courts, who can potentially weaken its intended protections.

Although the drafting of the proposed treaty on business and human rights gave hope to both victims and the civil society, the drafters will have to strike a balance between two conflicting tendencies. If the treaty ends up being too progressive and complex, many states will likely not be interested in becoming a party. Especially considering that even the aforementioned resolution of the Human Rights Council which established the OEIGWG was voted against by the US, Japan and the EU member states, countries in which the majority of TNCs is headquartered.[135] Moreover, some Western countries continue to oppose the drafting process and do not engage in the negotiations.[136] The US, for example, view the Zero Draft as a departure from the agreed framework in the UN GPs, which '*were painstakingly crafted to avoid the unworkable approach represented by the draft treaty*'.[137] The strong opposition to the new treaty among the home states of TNCs indicates that even if the treaty comes to life, it might not be ratified by many states.[138] On the other hand, if the drafters oversimplify the treaty in order to make all states willing to

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[132] Zero Draft (*supra* note 121), Art 1(2).

[133] Report on the fifth session of OEIGWG (*supra* note 126), p. 5, para 15.

[134] Zero Draft (*supra* note 121), Art 7.

[135] UNCTAD, 'The Universe of the Largest Transnational Corporations' (United Nations 2007), UNCTAD/ITE/IIA/2007/2, p. 4.

[136] See U.S. Mission to International Organizations in Geneva, 'The U.S. Government's Continued Opposition to the Business & Human Rights Treaty Process' (16 October 2019), <https://geneva.usmission.gov/2019/10/16/the-united-states-governments-continued-opposition-to-the-business-human-rights-treaty-process/> accessed on 22 January 2020.

[137] *Ibid.*

[138] *Ibid.*, 72.

participate, it will face the danger of becoming a mere proclamation, too abstract and not reflective of the diversity of all the relevant stakeholders.[139]

In conclusion, although neither TNCs nor other corporations can be *de lege lata* responsible for violations of human rights under human rights treaty law, there are growing tendencies for rethinking this approach. These tendencies are fuelled by the changing allocation of power in the world. Considering that international legal personality can be granted to entities by wide acceptance in the form of conferral of rights and obligations by states under international law, an international treaty could serve as the appropriate tool. However, as the negotiations currently under way in the OEIGWG show, the drafters will have to strike a delicate equilibrium. In order for the treaty to gain sufficient support, it will have to accommodate the suggestions of states which are home to the majority of TNCs. On the other hand, the treaty will also need to retain some normative power and not be diluted to an ineffective proclamation.

2.3. Enforcing corporate responsibility through international criminal law

As explained in the previous subsection, subjects of international human rights treaty law are states and direct obligations of non-state actors in this field are not well established. To the contrary, there is no doubt that non-state actors are subjects of international criminal law, while states are excluded from its scope.[140] Moreover, international criminal law is less problematic when it comes to extraterritorial exercise of jurisdiction.[141] Therefore, international criminal law has been in the centre of attention of those who suggest that it could provide the missing enforcement tool for corporate human rights abuses.[142] This assumption, however, faces two major problems. First, it is contentious whether the applicability of customary norms, which paved the way for direct individual responsibility, could be extended to corporations. Second, the scope of international criminal law is limited only to the most serious crimes of concern to the international community as a whole, leaving many (if not most) instances of corporate human rights violations without any legal recourse.

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[139] Pierre Thielborger and Tobias Ackermann, 'A Treaty on Enforcing Human Rights against Business: Closing the Loophole or Getting Stuck in a Loop' [2017] 24 Ind. J. Global Legal Stud. 43, pp. 68-69.

[140] Larissa van den Herik and Jernej Letnar Cernic, 'Regulating Corporations under International Law' [2010] 8 J Int'l Crim Just 725, p. 126.

[141] *Ibid.*, p. 740.

[142] *Ibid.*, p. 739.

2.3.1. Prosecuting corporations for international crimes

Turning to the first problem, already the Charter for the Nuremberg Tribunal restricted the Tribunal's jurisdiction to natural persons.[143] The Nuremberg Tribunal stated that '*crimes against international law are committed by men, not abstract entities*[...].'[144] This approach to limit jurisdiction to natural persons was then followed when establishing other international criminal tribunals.[145] Interestingly, the *travaux préparatoires* of the Rome Statute of the International Criminal Court show that the drafters considered extending the ICC's jurisdiction to corporations.[146] Among the soundest arguments against this extension was the fact that corporate criminal liability is by no means universal to all jurisdictions.[147] In the end, therefore, the Rome Statute provides that '[t]*he Court shall have jurisdiction over natural persons pursuant to this Statute*.'[148] The fact that the inclusion of private legal persons was so explicitly rejected in case of the Rome Statute only strengthens the argument that there is no sufficient intention and/or will to impose obligations onto corporations.

Nonetheless, the ICC could in theory prosecute individual company executives involved in international criminal behaviour. Such prosecution is, however, not at all common or readily available. The ICC will generally only deal with individual criminal liability of corporate officers in cases where their actions fall in the scope of a complex criminal case referred to the ICC by a state party or the UN Security Council or which is investigated by the Prosecutor *proprio motu*.[149] Since the number of situations under investigation by the ICC is rather limited, officers of most

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[143] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (8 August 1945) 82 U.N.T.S. 280, Article 6.

[144] Nuremberg International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1947, p. 223.

[145] see UN Security Council Res. 827, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (25 May 1993), Article 6; UN Security Council Res. 955, *Statute of the International Tribunal for Rwanda* (8 November 1994), Article 5.

[146] Albin Eser 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol.1* (Oxford University Press 2002), p. 778.

[147] *Ibid,* p. 779; see also Kai Ambos 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed., C.H. Beck, Hart, Nomos 2008), p. 747.

[148] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90, Article 25.

[149] David Scheffer 'Corporate Liability under the Rome Statute' [2016] 57 Harvard International Law Journal 35, p. 36.

corporations will not be exposed to the danger of ICC investigations.[150] Moreover, the ICC's jurisdiction is limited on personal, geographical and temporal basis. It can be exercised only over nationals of a state party to the Rome Statute, or over a crime committed on the territory of a state party no sooner than on 1 July 2002.[151] Since the US and Russia withdrew their signatures from the Rome Statute, some signatories have not yet ratified it and China, India, many Southeast Asian states and some African states are not signatory at all,[152] the ICC jurisdiction is nowhere near universal. On top of these jurisdictional restrictions, an issue of admissibility arises due to the fact that the ICC is an *ultima ratio* forum, only available in cases where the state party is unwilling or unable to prosecute the crime.[153] Due to all of these factors, the ICC cannot function as a forum for enforcement of corporate human rights obligations and will only rarely prosecute corporate officers for international crimes.

On the other hand, an opposite tendency on the issue of jurisdiction over legal persons can also be observed, albeit mostly on regional level. In 2014, the African Union adopted the Malabo Protocol, which extends jurisdiction of the African Court of Justice and Human Rights to transnational crimes under international law.[154] This newly broadened jurisdiction covers corporate criminal responsibility,[155] extending the applicability of international criminal law to corporations.[156] As Clapham notes, this development might be considered by some as a 'regional anomaly'.[157] It is, nonetheless, a notable development. As described above, states have the power to recognize subjects as having international legal personality by granting them rights and

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[150] *Ibid.*

[151] *Ibid.*, Arts 11-12.

[152] UN Treaty Collection, Rome Statute of the International Criminal Court <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en> accessed 23 January 2020.

[153] Rome Statute (*supra* note 148) Art 17.

[154] Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court (22 January 2016), AFR 01/3063/2016, p. 5.

[155] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014), Article 46C.

[156] Andrew Clapham, 'Human Rights Obligations for Non-State-Actors: Where are We Now?' in Fannie Lafontaine and François Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia 2018), p. 23.

[157] *Ibid.*, p. 24.

imposing obligations onto them.[158] In this context, the Malabo Protocol is a very significant indicator that at least some states are, in principle, willing to recognize corporations as subjects of international criminal law. Moreover, as a panel of the Special Tribunal for Lebanon observed in its 2014 decision, '*corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law*.'[159]

2.3.2. Limited intersection between international crimes and human rights

Second problem of designating international criminal law as a tool for enforcement of responsibility for human rights violations is that even if international criminal responsibility was extended to corporations, it would cover only the most severe of crimes. The majority of human rights susceptible to corporate abuse would thus remain without adequate protection.[160] Customary norms directly imposing international obligations upon individuals evolved from armed conflicts.[161] Some peacetime offences such as crimes against humanity (e.g. murder, enslavement, torture, rape),[162] genocide and aggression are also punishable under customary international law[163] and have been codified in, for example, the Rome Statute of the ICC. Some of these crimes are clearly directed at, among others, the rights to life and personal integrity[164] and therefore share values with international human rights law.

In terms of TNCs, such norms could be relevant as private businesses, especially military and security corporations, have been increasingly implicated in actions which would amount to

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[158] Sir R Jennings and Sir A Watts, *Oppenheim's International Law, Vol. I, Introduction and Part 1* (9th ed., Longman Group UK Limited 1992), p. 16; Jan Wouters and Anna-Luise Chané 'Multinational Corporations in International Law' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds) *Non-State Actors in International Law* (Hart Publishing 2015), p. 228.

[159] *New TV Karma Mohamed Tashin Al Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt proceedings, STL-14-05/PT/AP/AR126.1, 2 October 2014, para. 60.

[160] Pierre Thielborger and Tobias Ackermann, 'A Treaty on Enforcing Human Rights against Business: Closing the Loophole or Getting Stuck in a Loop' [2017] 24 Ind. J. Global Legal Stud. 43, p. 60.

[161] Cassese (*supra* note 87), p. 144.

[162] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90, Art 7.

[163] Cassese (*supra* note 87), p. 144.

[164] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd ed., Oxford University Press 2014), p. 115.

international crimes, particularly in the conflict zones.[165] There, they may aid the conflict by providing goods (e.g. weapons) and illicit funds, or military and security services.[166] Other TNCs, such as oil, gas and mining corporations are also a relatively frequent culprit.[167] A TNC may engage in internationally relevant criminal behaviour in different ways. It can get involved with military regimes and authoritarian governments. In such cases a TNC will either profit from human rights violations committed by the state, aid and abet crimes of the state by providing necessary means, or it will directly cooperate with the regime in carrying out the criminal acts.[168] This was allegedly the case of, for example, the activities of Unocal[169] in Myanmar. In the 1990s, Unocal was constructing a pipeline in Myanmar, a military dictatorship with poor human rights record. The construction was allegedly tainted by forced labour, rape, torture and murder committed by the military to the profit of and on behalf of Unocal. Although Unocal eventually settled this case with the victims out of court, US courts suggested that it did aid and abet the crimes of the military in Myanmar.[170]

However, most consequences of the operations of TNCs which are harmful to human rights will probably not appear in conflict zones or in relation to dictatorships, but rather in the rainforests, mines, factories and warehouses. In this context, the crime against humanity is of special interest and some debate is evolving around its scope. This category of international crimes undoubtedly encompasses crimes like murder, extermination, enslavement, torture and rape, however only when these acts occur in '*widespread or systematic attack directed against a civilian population.*'[171] These crimes are all listed for example in Article 7 of the Rome Statute and Article 5 of the ICTY Statute and do not require any nexus to war.[172] Interestingly, all definitions of crimes

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[165] Larissa van den Herik and Jernej L Černič, 'Regulating Corporations under International Law' [2010] 8 J Int'l Crim Just 725, pp. 739-740.

[166] Wolfgang Kaleck and Miriam Saage-Maass 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges' [2010] Journal of International Criminal Justice 8/3, 699, p. 707.

[167] *Ibid.*

[168] Kaleck and Saage-Maass (*supra* note 166), pp. 703-707.

[169] Union Oil Company of California.

[170] *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002).

[171] Robert Cryer, Darryl Robinson and Sergey Vasiliev 'Crimes Against Humanity' in *An Introduction to International Criminal Law and Procedure* (4th ednCambridge University Press 2019), 227.

[172] *Ibid.*, p. 231.

against humanity are somewhat open-ended, ending the listing with '*or other inhumane acts*.'[173] Thus, many victims of land-grabbing and the vast ecological destruction in the Amazon, for example, as well as a number of civil society organizations suggest that the crime of 'ecocide' should be recognized as a crime against humanity.[174] There is, however, no agreement on a definition of the crime of ecocide or other ecological crime.[175] As international criminal law is governed by the principle of legality reflected in the maxim of *nullum crimen sine lege*,[176] a clear obligation must exist to establish criminal responsibility for its breach. Therefore, the crime of ecocide or any other addition to the catalogue of crimes against humanity would require state practice and *opinio iuris* sufficient to form a new customary norm.[177] Even if, however, some instances of extensive environmental damage were eventually recognized as crimes against humanity, most human rights violations related to environmental damage would not be falling under this category, as the damage would not reach the scope or intensity required by the possible definition of ecocide. Thus, isolated crimes happening outside war or a broader 'widespread and systematic' action would still be governed by national law.[178]

In conclusion, TNCs are currently not under an obligation to respect human rights, as they have not yet been recognized by states to have international legal personality in this regard. Therefore, neither human rights treaties, nor international customary norms are directly binding upon them.[179] Moreover, even if legal persons were recognized as subjects of international criminal law, the majority of human rights abuses committed by TNCs would not be prosecuted, because

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[173] *Ibid.*, 257.

[174] Natasha Lennard 'Ecocide Should Be Recognized as a Crime Against Humanity, but We Can't Wait for The Hague to Judge' (24 September 2019) <https://theintercept.com/2019/09/24/climate-justice-ecocide-humanity-crime/> accessed 7 January 2020.

[175] M. Jambozorg *et al.* 'Challenges ahead of codification of environmental crime indices as an international crime' [2015] 12 Int. J. Environ. Sci. Technol. 3719, p. 3721.

[176] Andreas Gordon O'Shea 'Individual Criminal Responsibility' (2009) in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015, online edn), para 3.

[177] *Ibid.*

[178] Cryer, Robinson and Vasiliev (*supra* note 171), p. 230.

[179] Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities', pp. 6-7 <http://esil-sedi.eu/wp-content/uploads/2018/04/Nowrot.pdf> accessed 27 June 2019; Eric De Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' [2010] 4 Hum. Rts. & Int'l Legal Discourse, 66, p. 74.

they would not reach the intensity required for international crimes.[180] Therefore, although potentially useful in certain limited cases, international criminal law cannot substitute enforcement mechanisms missing in international human rights law. From this perspective, the negotiations of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises is a promising development. The drafters of this instrument, however, face a difficult task of achieving compromise acceptable for as many states as possible, while avoiding excessive softening of its provisions. Only time will tell if such compromise is achievable at all.

[180] Justine Nolan 'The nexus between human rights and business: Defining the sphere of corporate responsibility' in Jeremy Farrall and Kim Rubenstein (eds) *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press 2009), p. 228.

3. Obstacles to holding transnational corporations accountable on the national level

As noted by Muchlinski, there is no positive duty for private individuals, including corporations, to observe human rights.[181] They are only obligated to obey the national law.[182] Under international human rights law, it is the individual sovereign states who are under an obligation to respect, protect and fulfil.[183] Although the scope of state responsibility to protect ('R2P' in the narrower sense) will not include any and all rights recognized in international treaties, it without a doubt covers basic human rights such as right to life, bodily integrity, or basic nutrition and health.[184] In broader sense, states undertake to protect human rights in individual covenants and treaties, when they undertake to 'ensure' or 'secure' the rights contained in that treaty to everyone within their jurisdiction.[185] This Chapter deals with state duty to protect individuals from third parties violating their human rights in this broader sense.

In relation to business, the duty to protect is essential, as it entails the state duty to protect individuals from human rights abuse by third parties, including business corporations.[186] The duty to protect is realized by states within their sovereign jurisdiction, which may be divided into jurisdiction to regulate, adjudicate, and enforce.[187] The territorial scope of such jurisdiction, however, is limited by multiple factors. Coupled with inability or unwillingness of some states to protect human rights according to international standards, the territorial limitation of the duty to protect potentially forms a serious obstacle to holding transnational business accountable.

Additionally, an important component of the state duty to protect against business-related human rights abuses is providing access to effective remedies.[188] However, practice shows that

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[181] Peter T Muchlinski 'Human Rights and Multinationals: Is There a Problem?' in David Kinley (ed), *Human Rights and Corporations* (Routledge 2017), p. 34.

[182] *Ibid.*

[183] UN Committee on Economic, Social and Cultural Rights, General Comment No. 24: on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 10.

[184] David Miller, 'The responsibility to protect human rights' in Lukas H Meyer (ed), *Legitimacy, Justice and Public International Law* (Cambridge University Press 2010), p. 232.

[185] See Section 3.1. below.

[186] *Ibid.*; Markus Krajewski, 'The State Duty to Protect against Human Rights Violations through Transnational Business Activities' [2018] 23 Deakin L. Rev. 13, p. 18.

[187] Anthony J Colangelo, 'What Is Extraterritorial Jurisdiction' [2014] 99 Cornell L. Rev. 1303, p. 1310.

[188] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights:

many states have not been willing or able to respond to the rise in power of transnational business by providing adequate and effective means of redress.[189] For a multitude of reasons, victims of human rights violations are much too often left with no possibility for remedy, or have their access to justice excessively burdened. Common obstacles include legal reasons, such as corporate law limitations to liability, political reasons, such as corruption, and factual reasons, such as lack of expertise of courts.[190]

This Chapter examines ways in which the state duty to protect falls short of preventing human rights abuses by transnational business, especially in developing countries. First, it examines the limitations of states' prescriptive jurisdiction. Second, it analyses political and economic obstacles which may hinder holding transnational business to account. Third, it describes limits of the adjudicative jurisdiction of developed countries' courts, including corporate law obstacles to an effective access to remedy on national level. While doing so, it provides practical examples of the difficulties facing victims of transnational business.

3.1. Limited territorial scope of state duty to protect

National law is 'the principal jurisdiction' for legal regulation of TNCs.[191] The state duty to protect individuals from human rights violations forms the first pillar of the UN Guiding Principles on Business and Human Rights and requires states to take 'appropriate' steps, which may include policy, legislative, administrative or judicial measures.[192] In case of TNCs, which are by definition present and operating across multiple states, a question of territorial limitations of

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Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011), A/HRC/17/31, p. 22, Principle 25; ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (5th ed., International Labour Organization 2017), p. 15, para. 64; Anil Yilmaz Vastardis and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?'[2018] International and Comparative Law Quarterly, Volume 67, Issue 2, p. 411; UN Committee on Economic, Social and Cultural Rights, General Comment No. 24 (*supra* note 183), para. 38.

[189] Olivier de Schutter, Anita Ramasastry, Mark B Taylor, Robert C Thompson 'Human Rights Due Diligence: The Role of States, December 2012' <http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf> accessed 1 December 2019, p. 1.

[190] *Ibid.*

[191] Peter T Muchlinski, *Multinational Enterprises & the Law* (2nd ed., Oxford University Press 2007), p. 125.

[192] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011), A/HRC/17/31, p. 7.

state jurisdiction arises. Stemming from their sovereignty under public international law, states have original 'prescriptive' jurisdiction to regulate the conduct of individuals through national law.[193] This authority is, however, limited by the corresponding rights of other states.[194] Therefore, state jurisdiction is, in its essence, territorial and '*the extraterritorial exercise of jurisdiction is the exception that makes the norm'.*[195] These exceptions that allow states to regulate beyond national borders are most prominent in criminal law. They include personal jurisdiction, where a state may regulate conduct of its nationals without being limited by its borders, or protect its nationals abroad.[196] Muchlinski suggests that states can, on the basis of the nationality link, require their domiciled companies to order their foreign subsidiaries to comply with that state's domestic law.[197] Arguably, however, such act would not even be considered as extraterritorial exercise of jurisdiction.[198] Moreover, under the protective principle, a state may have jurisdiction over the conduct that threatens its national security. Lastly, the principle of universality allows states to assert jurisdiction over most severe crimes against international law, which harm the whole international community.[199]

The term 'jurisdiction' is essential not only to determine whether a state has the right to regulate, it is also crucial when determining the scope of state obligations under international human rights treaties.[200] Different human rights treaties vary in how they delimit their applicability, however, they usually tie it to jurisdiction in some way. For example, under the ICCPR, a state must protect human rights of '*individuals within its territory and subject to its*

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[193] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2015), p. 5; Čestmír Čepelka and Pavel Šturma, *Mezinárodní parvo veřejné* (2nd ed., C. H. Beck 2018), p. 36.

[194] *Ibid.*; see also Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' [2008] 8:3 Human Rights Law Review 411, p. 422.

[195] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' [2018] Business and Human Rights Journal, Volume 3, Issue 1, 47, available at <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/home-state-duty-to-regulate-the-human-rights-impacts-of-tncs-abroad-a-rebuttal/B292F0D2EB7E40152011F3B0D42E96FE/core-reader> accessed 14 December 2019.

[196] *Ibid.*

[197] Peter T Muchlinski, Multinational Enterprises & the Law (2nd ed., Oxford University Press 2007), pp. 126-127.

[198] Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot E. Salomon and Ian Seiderman, 'Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights' [2012] Human Rights Quarterly 34(4), 1084, p. 1141.

[199] Methven O'Brien (*supra* note 194).

[200] Nicola Wenzel 'Human Rights, Treaties, Extraterritorial Application and Effects' (2008) in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015, online edn), para 3.

jurisdiction'.[201] According to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the contracting states '*shall secure to everyone within their jurisdiction the rights and freedoms defined* [in the Convention].'[202] Similarly, the American Convention on Human Rights obligates contracting states to '*ensure to all persons subject to their jurisdiction the free and full exercise*' of their human rights.[203] Generally, the term 'jurisdiction' in these provisions is understood to indicate that the duty to protect human rights is primarily territorial, because it would be unreasonable to require states to secure human rights for people outside of their reach.[204] Nonetheless, there are some relatively well-established exceptions from the territorial delimitation of applicability of human rights treaties. First, a state has human rights obligations with respect to a territory over which it exercises effective control, for example in cases of military occupation.[205] Moreover, jurisdiction may arise through effective personal control over an individual. This requires a specific physical or legal relationship in which a state agent acts as an authority over a specific individual.[206]

A distinction, however, needs to be made between an extraterritorial obligation to respect human rights under a treaty and the territorial reach of state duty to protect.[207] With regard to the latter, as De Schutter noted in 2006, a clear obligation of states under international law to control individuals, including corporations *'operating outside their national territory, in order to ensure that these actors will not violate the human rights of others, has not cristallized* [sic] *yet*.'[208]

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[201] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171, Art 2(1).

[202] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), as amended by Protocols Nos 11 and 14, ETS 5, 213 U.N.T.S. 221, Art 1.

[203] Organization of American States, American Convention on Human Rights (22 November 1969), 1144 U.N.T.S. 123, Art 1.

[204] Nicola Wenzel (*supra* note 200), para 5.

[205] Olivier De Schutter, International Human Rights Law: Cases, Materials, Commentary (3rd ed., Cambridge University Press 2019), p. 147; see also e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, 136, paras. 107-113; *Banković et al. v. Belgium et al.* (App. no. 52207/99), Decision on Admissibility of 12 December 2001, ECHR 2001-XII, para. 60.

[206] De Schutter (*supra* note 205), pp. 161-162; see also Ibrahim Kanalan 'Extraterritorial State Obligations beyond the Concept of Jurisdiction' [2018] German L.J. 19 (2018), 43, pp. 52-53; *El Mahi and Others v. Denmark* (App. no. 5853/06), Decision on Admissibility of 11 December 2006, ECHR 2006-XII, pp. 8-9.

[207] Markus Krajewski, 'The State Duty to Protect against Human Rights Violations through Transnational Business Activities' [2018] 23 Deakin L. Rev. 13, p. 26.

[208] Olivier De Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' [2006] <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> accessed 14 December 2019, pp. 18-19.

Similarly, Professor Ruggie, the UN Special Representative on Business and Human Rights, commented in his final 2011 report as follows:

> *At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.*[209]

De Schutter, nonetheless, argues that this approach is changing, citing various soft law instruments.[210] The *Committee on Economic, Social and Cultural Rights*, as well as other human rights treaty bodies have stressed the importance of extraterritorial prevention.[211] For example, the CESCR's General Comment no. 14 states that:

> *To comply with their international obligations in relation to article 12* [of the ICESCR]*, States parties have to* […] *prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means* […].[212]

This view was also endorsed and further refined by a number of human rights experts in the Maastricht Principles.[213] This instrument was drafted with an ambition to '*contribute to filling the normative and accountability gap resulting from processes of globalization',*[214] and clearly defining the normative framework, which is shaping up in the CESCR's general comments.[215] Perhaps most significant regarding transnational business is Principle 25(c), which provides for a state obligation to adopt and enforce legal and other means to protect economic, social and cultural rights when a corporation, its parent or a controlling company '*has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the*

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[209] UN Guiding Principles (*supra* note 192), p. 7.

[210] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2nd ed., Cambridge University Press 2014), p. 188.

[211] See e.g. UN Committee on Economic, Social and Cultural Rights, General Comment No. 24: on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paras. 30-35.

[212] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 39.

[213] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights in De Schutter *et al.* (*supra* note 189).

[214] Fons Coomans 'Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' [2013] Maastricht Faculty of Law Working Paper, p. 2.

[215] *Ibid.,* p. 4.

State concerned.'[216] This principle seems to reflect another argument of some scholars that the extraterritoriality of the duty to protect human rights can be inferred by analogy from the customary international law rule of *sic utere tuo ut alienum non laedas*, i.e. the 'no harm rule'.[217] This principle of international environmental law formulated in *Trail Smelter* arbitration prohibits states to allow the use of their territory in a way that would cause injury in another state.[218] However, there is no practice of human rights courts and committees to support the extension of the no harm rule to human rights.[219] Either way, De Schutter predicts the Maastricht Principles to help the development of case law '*further strengthening the evolution towards the recognition of human rights extra-territorial obligations…*'.[220]

In spite of these developments towards a clearer obligation of states to protect human rights beyond their borders, most states do not accept this notion.[221] Where there is no such obligation explicitly expressed in a human rights treaty, the states have not agreed to be bound in such extent.[222] Therefore, the current *status quo* of international law seems to favour the interpretation offered by Ruggie that states are not under a general obligation to regulate business activities relevant for protection of human rights extraterritorially, however, they may do so where they have the prescriptive jurisdiction.[223]

3.2. Economic and political obstacles

Sometimes, economic and political reasons form another obstacle to achieving effective national law accountability mechanisms for TNCs in both the host states and the home states. The political power of some TNCs allows them to influence negotiations of international agreements,

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[216] *Ibid,* pp. 12-13; De Schutter *et al.* (*supra* note 189), p. 1137.

[217] Coomans (*supra* note 214), p. 15; Markus Krajewski, 'The State Duty to Protect against Human Rights Violations through Transnational Business Activities' [2018] 23 Deakin L. Rev. 13, p. 24.

[218] *Trail Smelter Case* (U.S. v. Canada), 3 UN Rep. Int'l Arbitral Awards 1905 (April 16, 1938), p. 1965.

[219] Krajewski (*supra* note 207), p. 25.

[220] De Schutter 2nd ed. (*supra* note 210)., pp. 188-190.

[221] Coomans (*supra* note 214), p. 6; Jack Donnelly, 'State Sovereignty and International Human Rights' [2014] Ethics & International Affairs, 28(2), 225, pp. 231-232; see also *Aerial Herbicide Spraying* (Ecuador v. Colombia), Counter-Memorial of the Republic of Colombia, Vol I., ICJ, 29 March 2010, paras. 9.3-9.53.

[222] Coomans (*supra* note 214), p. 6.

[223] UN Guiding Principles (*supra* note 192), p. 7.

as well as formation of national and international economic policy.[224] For example, the TRIPS Agreement,[225] which is binding in 164 countries, was essentially developed by twelve chief executive officers of pharmaceutical, entertainment and software industries.[226]

The economic power of TNCs is evidenced in their revenues compared to individual state economies. In 2015, the world's top 10 richest corporations had a combined revenue of more than the 180 'poorest' countries together.[227] TNCs naturally use such power for their main purpose - to maximise profit.[228] In the host states, the economic leverage of businesses from the developed countries is that '*foreign direct investment* [is] *replacing intergovernmental aid as the most important means of transferring capital and technical know-how from the developed to the developing world*'.[229] Tomuschat even suggests that the economic power of certain TNCs gives them the ability to act without any governmental oversight.[230] The phenomenon of (developing) states deliberately lowering regulatory standards to attract and retain investments is called 'race to the bottom' and in terms of human rights affects especially labour rights.[231]

The race to the bottom in developing countries might be further fuelled by investments from countries with lower *de jure* and *de facto* labour rights standards. For example, China is

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[224] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' [2002] 20 Berkeley J. Int'l L., 45, p. 58.

[225] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

[226] Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003), pp. 1-2.

[227] Global Justice Now, '10 biggest corporations make more money than most countries in the world combined' (12 September 2016) <https://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined> accessed 17 December 2019.

[228] Pavel Ondřejek, 'Business Corporations and the Constitutionalisation of Private Law' in Pavel Šturma and Vinícius Almada Mozetic (eds), *Business and Human Rights* (rw&w Science & New Media Passau-Berlin-Prague 2018), p. 131.

[229] Menno T Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000), p. 2.

[230] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd ed., Oxford University Press 2014), p. 133.

[231] Ann-Sofie Isaksson and Andreas Kotsadam, 'Racing to the bottom? Chinese development projects and trade union involvement in Africa' [2018] World Development vol. 106, issue C, 284, p. 286; see also Jan Ondřej 'Vybrané otázky mezinárodní ochrany lidských práv ve vztahu k právnickým osobám, zejména k nadnárodním (transnacionálním) společnostem' in Pavel Šturma and Martin Faix (eds), *Lidskoprávní dimenze mezinárodního práva* (Univerzita Karlova v Praze, Právnická fakulta 2014), p. 47.

known for being at the bottom in terms of protection of labour rights[232] and Chinese investments have been implicated in lowering labour standards in some African host countries.[233] In Namibia, it was reported that Chinese companies have not been adhering to national labour laws with impunity,[234] which results in unfair competition. Local companies, in order to remain competitive, may then be compelled to equally lower their labour standards and, consequently, the influence of Chinese investors may have adverse effect on labour rights in the entire recipient region.[235]

The home states of TNCs' parent companies can also be very reluctant to regulate extraterritorial acts of these corporations and their subsidiaries.[236] Currently, home states are not under a hard-law obligation to do so.[237] Therefore, the threat of the TNC's parent company relocating its seat to a different country may be sufficient to hamper imposition of a stricter regulation. Ruggie gives the example of Canada, which is home to the largest number of mining corporations in the world.[238] Under the threat of exodus of mining TNCs from Canada, a regulation of overseas activities of mining business in relation to human rights failed in the Canadian Parliament in 2010.[239] Moreover, home states of TNCs may sometimes block access to remedy for victims of human rights abuse for various political reasons. An example is the George W Bush's 2003 Executive Order no. 13303.[240] This order represented a blank norm of sort, granting immunity to oil corporations operating in Iraq[241] by essentially protecting any money related to

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[232] Isaksson and Kotsadam (*supra* note 231), p. 286 citing Teri L Caraway 'Labour rights in East Asia: Progress or regress' [2009] Journal of East Asian Studies 9, 153.

[233] Isaksson and Kotsadam (*supra* note 231), pp. 285-287.

[234] *Ibid*, p. 287 citing Herbert Jauch and Iipumbu Sakaria, 'Chinese Investments in Namibia: A Labour Perspective' [2009] Labour Resource and Research Institute.

[235] *Ibid.*

[236] Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' [2014] 30(78) Utrecht Journal of International and European Law 24, p. 26.

[237] Larissa van den Herik and Jernej L Černič, 'Regulating Corporations under International Law' [2010] 8 J Int'l Crim Just 725, p. 728.

[238] John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton, 2013), p. 22 in pdf citing Liezel Hill, 'Canadian Lawmakers Vote Down Controversial Bill C-300'(28 October 2010) <http://www.miningweekly.com/article/canadian-mps-vote-against-bill-c-300-2010-10-28> accessed 18 December 2019.

[239] *Ibid*.

[240] Executive Order of the President of the United States of America No. 13303—Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest (22 May 2003).

[241] Claire R Kelly, 'The War on Jurisdiction: Troubling Questions About Executive Order 13303' [2004] 46 Arizona L. Rev. 483, p. 485.

Iraqi oil from lawsuit or enforcement in the United States.[242] Its wording was so broad that it encompassed all possible impacts of oil companies' operations, including environmental harm and human rights abuses. Consequently, US oil companies could be sued neither by US citizens, nor by foreigners under the US Alien Torts Statute.[243]

Lastly, a specific situation can occur in countries which are emerging from conflicts or transitioning to democracy. Often in the process of transitional justice, former political elites will be prosecuted for abuse of human rights.[244] Economic elites, however, are not as likely to be brought to justice, because they are seen as essential for rebuilding the society.[245] Moreover, the weak state institutions in countries in transition can be especially vulnerable to obstruction of justice from corporations, which are using their power to escape justice for violations committed during conflict or dictatorship.[246] Such practices include bribery and corruption, delaying and obstructing judicial proceedings, or even attacks against human rights advocates.[247]

Taking into consideration the examples listed above, it can be concluded that the economic power of TNCs and the political environment in both home and host states are a significant factor frequently undermining the efforts to achieve accountable business. From this perspective, a comprehensive uniform international regulation might be a good solution. If the standards for business conduct are given a uniform benchmark, racing to the bottom in terms of regulation would no longer be an option.

3.3. The corporate veil

Based on the broad definition of a TNC provided above, the corporate structure of such entity may significantly vary from a simple parent-subsidiary model to layers upon layers of

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[242] *Ibid.*, p. 491.

[243] Julie A Mertus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (2nd ed., Routledge 2008), p. 195.

[244] Wolfgang Kaleck and Miriam Saage-Maass 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges' [2010] Journal of International Criminal Justice 8/3, 699, pp. 718.

[245] *Ibid.*

[246] Genevieve Paul and Judith Schönsteiner, 'Transitional Justice and the UN Guiding Principles on Business and Human Rights' in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013), p. 85.

[247] *Ibid.*

intermediaries.[248] When it comes to human rights violations by such entities, uncovering the ownership structure can be of utmost importance for the victims' access to effective remedies as well as access to assets available for enforcement.[249] As the case may frequently be, the daughter company which violates human rights may not be sufficiently funded. Moreover, the host state's criminal law may not provide for criminal liability of legal persons. Tracing the beneficiary of the subsidiary's actions may therefore be the only chance for victims of human rights violations to access justice.[250]

Nevertheless, regulations of liability of shareholders differ from state to state. Generally, both common law and civil law jurisdictions recognize the corporate law principle of separate personality,[251] under which shareholders are not personally liable for debts of the company in question. This divide can exceptionally be overcome by courts by extending liability in an act commonly referred to as 'piercing' or 'lifting' the corporate veil.[252] As Lord Sumption remarked, '*the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse*'.[253]

Most EU jurisdictions allow piercing of the corporate veil in some situations. It is, however, considered as a 'narrow exception' from the doctrine of separate personality.[254] According to Augenstein's 2010 report to the European Commission, the veil-piercing is essentially possible in two scenarios. Either when the parent's and the subsidiary's assets are commingled and used in bad faith,[255] or when the corporate veil is abused for illegal conduct or to defeat the existing rights

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[248] Sarianna M Lundan and Hafiz Mirza, 'TNC evolution and the emerging investment-development paradigm' [2010] UNCTAD Transnational Corporations Vol 19 no 2, 29, pp. 47-50.

[249] Anil Yilmaz Vastardis and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?'[2018] International and Comparative Law Quarterly, Volume 67, Issue 2, pp. 389-423.

[250] *Ibid.*, pp. 393-394.

[251] David J Karp, 'Transnational Corporations in Bad States: Human Rights Duties, Legitimate Authority and the Rule of Law' [2009] in International Political Theory, 1 IT, 87, p. 103.

[252] Cheng-Han Tan, Jiangyu Wang, and Christian Hofmann, 'Piercing the Corporate Veil: Historical, heoretical & Comparative Perspectives' [2019] in 16 Berkeley Bus. L.J., p. 140.

[253] *Prest v. Petrodel Resources Ltd* [2013] UKSC 34, para. 27.

[254] Daniel Augenstein, Alan Boyle and Navraj Singh Galeigh, 'Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union' (European Commission 2010), pp. 62-63, para. 189.

[255] This applies, for example in Germany, Italy, Romania, Slovenia, and France. See *Ibid.,* see also Tan, Wang, and Hofmann (*supra* note 252), p. 152.

of shareholders.[256] Similar approach to the veil-piercing is prevailing in the common law jurisdictions,[257] considering the abuse of law to be the justification for disregarding a separate legal personality.[258] Likewise in China, the corporate veil may be lifted when a shareholder intentionally abuses it and causes serious harm to the company's creditors.[259]

If these rules on corporate veil-piercing were interpreted sufficiently broadly, they would potentially allow holding at least some parent companies liable for human rights abuses by their offshore subsidiaries. However, courts are generally reluctant to extend interpretation of these rules beyond a very narrow ambit.[260] Principally, using the corporate veil to allocate business-associated risks is regarded as legitimate and does not as such justify veil piercing.[261] Making use of the difference in regulations of corporate veil in different jurisdictions, transnational business can thus engage in 'shell games' to shield itself from responsibility.[262]

The corporate veil can pose a hurdle for human rights claimants in all three stages of the proceedings.[263] First, they must demonstrate a *prima facie* case against the parent company in the jurisdictional phase. Second, if the claim successfully proceeds to the merits phase, the claimants must prove a fraudulent intention of the parent company or prove that the subsidiary is just a 'sham'. Lastly, in the enforcement phase, the corporate veil poses a hurdle for claimants who

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[256] *Ibid.*

[257] For example in the UK, the US and Singapore. See Cheng-Han Tan, Jiangyu Wang, and Christian Hofmann, 'Piercing the Corporate Veil: Historical, heoretical & Comparative Perspectives' [2019] in 16 Berkeley Bus. L.J., p. 143.

[258] *Ibid.*

[259] See Article 20(3) of the Company Law of the People's Republic of China (promulgated 29 December 1993), see also Ma Ji 'Multinational Enterprises' Liability for the Acts of Offshore Subsidiaries: The Aftermath of Kiobel and Daimler' [2015] 23 Michigan State International Law Review 397, p. 406.

[260] Anil Yilmaz Vastardis and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?' [2018] International and Comparative Law Quarterly, Volume 67, Issue 2, p. 395; see also Jennifer Zerk 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' [2013] A report prepared for the Office of the UN High Commissioner for Human Rights, p. 50.

[261] Zerk (*supra* note 260), p. 46.

[262] Michael Osborne, 'Apartheid and the Alien Torts Act: Global Justice Meets Sovereign Equality' in Max du Plessis and Stephen Peté (eds), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia 2007), p. 241.

[263] Vastardis and Chambers (*supra* note 260), pp. 395-397.

successfully sue the offshore subsidiary as the subsidiary may be underfunded, insolvent or even defunct.[264]

In contrast, quite effective corporate veil-piercing is possible based on an international treaty, as evidenced by the international investment law practice and as pointed out by Vastardis and Chambers.[265] As they concur, the difference between the effective bilateral investment treaty (BIT) veil-piercing regime and the ineffective and burdensome national-law regime can be well demonstrated on the cases of the oil giant Chevron (formerly Texaco) in Ecuador.[266] Chevron is one of the most profitable TNCs in the world.[267] When it was sued by Ecuadorian and Peruvian victims of its subsidiary's activities, it invoked the corporate veil defence on every occasion.[268] In the respective proceedings initiated in 1993 in the United States,[269] the claims were dismissed on *forum non conveniens* grounds. In a subsequent lawsuit in Ecuador, Chevron challenged jurisdiction of Ecuador's courts, bringing up the corporate veil again.[270] The Ecuadorian plaintiffs obtained a favourable judgment in Ecuador, however, Chevron no longer had any assets available for enforcement there. Eventually, the whole saga ended in Canada, where attempts to enforce the Ecuadorian judgment against Chevron's Canadian subsidiary failed, yet again, on corporate veil issues. To the issue of separate personality, the Canadian court asserted that:

> [i]*t is a bedrock principle of our corporate law.* […] [It] *means that corporations are separate entities from their shareholders, capable of carrying on business and incurring debts on their own behalf. Thus, if a judgment debtor is a parent corporation, it and not its shareholders or subsidiaries, is responsible for the debts it incurs.*[271]

Conversely, when Chevron initiated arbitral proceedings against Ecuador alleging denial of justice by Ecuadorian courts, it did so as an investor under the US–Ecuador BIT. One of the

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[264] *Ibid.*

[265] Anil Yilmaz Vastardis and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?'[2018] International and Comparative Law Quarterly, Volume 67, Issue 2, p. 403.

[266] *Ibid.*, p. 407.

[267] 2019 Fortune Media IP Limited, 2019 Fortune Global 500, Rank 28 <https://fortune.com/global500/2019/chevron/> accessed 12 December 2019.

[268] *Ibid.*, p. 408.

[269] *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 945 F.Supp 625 (S.D.N.Y. 1996).

[270] Vastardis and Chambers (*supra* note 260), p. 409.

[271] *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, para. 57.

jurisdictional questions was whether Chevron could claim rights stemming from an investment of its subsidiary, TexPet. To that point, the arbitral tribunal asserted that '*as TexPet's parent company, Chevron is a covered investor under Article I(1)(a) of the BIT because it indirectly owns or controls an "investment" in Ecuador*.'[272]

It is therefore evident that the standard for sufficient control of a parent company over a subsidiary that would justify disregarding the corporate principle of separate personality is set lower in international investment law. Although international investment law is far from uniform, Vastardis and Chambers note that there is certain consistency which, they suggest, could be used as a guidance for rethinking the current restrictive interpretation of the separate personality doctrine.[273] Specifically, they propose rethinking the test of control of the parent over the subsidiary. The control required by investment law focuses only to legal factors, such as ownership or managerial control, without any need for a proof of the actual involvement of the parent in the subsidiary's actions.[274] To the contrary, national courts generally only pierce the corporate veil in situations of a very substantial control of the parent over the subsidiary, where the subsidiary essentially serves as a mere vehicle.[275] Such high standard is a heavy burden of proof to carry for many human rights claimants.

In conclusion, national courts are rather reluctant to pierce the corporate veil, unless there is strong evidence of bad faith. Generally, however, using the corporate veil to allocate business-associated risks is regarded as legitimate and does not as such justify veil piercing. The principle of separate legal personality combined with this reluctancy of national therefore courts enables TNCs to avoid civil and/or criminal liability by establishing a network of subsidiaries. A possible solution in cases of human rights abuse by TNCs would thus be adopting a model similar to the one found in international investment law. This would mean focusing on legal requirements, such as certain ownership share, rather than attempting to prove bad faith and/or specific control in each individual instance. Unless a more victim-friendly approach to veil piercing is adopted, holding TNCs to account in domicile courts of the parent company and/or effectively enforcing favourable

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[272] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No 2009–23 Third Interim Award on Jurisdiction and Admissibility (27 February 2012), para. 4.24

[273] Vastardis and Chambers (*supra* note 260), p. 414.

[274] *Ibid.*, p. 414.

[275] See p. 16 above.

judgements is near impossible for some, and excessively burdensome for other victims of corporate human rights abuse.

3.4. Jurisdictional obstacles in civil liability cases

Frequently, it is enterprises domiciled in developed countries who decide to expand to developing countries, motivated by cheap work force or rich natural resources. According to OECD data, 60% of foreign affiliate production worldwide are controlled from the United States, United Kingdom, France, Germany, Japan, Netherlands and Switzerland.[276] The TNCs then significantly influence the population and the environment of the developing world, sometimes with a detrimental effect.[277] As a consequence, courts in rich Western countries are dealing with an increasing number of civil liability cases against TNCs for human rights abuses in developing countries.[278] Only a small minority of such cases, however, reach the trial phase. Most, to the contrary, end in settlement or fail on procedural issues.[279] This subsection focuses on selected jurisdictions (common law and civil law), in particular the United States and the EU member states, in order to provide a more detailed analysis of the jurisdictional issues connected to human rights violations happening abroad.

3.4.1. The narrow interpretation of the United States Alien Torts Statute

The United States Alien Tort Statute (28 U.S.C. § 1350), also known as the Alien Tort Claims Act, is a federal law adopted in 1789, which reads as follows:

> *The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*

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[276] Multinational enterprises in the global economy: Heavily debated but hardly measured, OECD Policy Notes. 4 <https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf> accessed 22 November 2019.

[277] Liesbeth F Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012), p. 113.

[278] Liesbeth F Enneking 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' [2014] Utrecht Law Review Vol 10, Issue 1, 44, p. 44.

[279] *Ibid.*, p. 51 citing Jonathan C Drimmer and Sarah R Lamoree, 'Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions' [2011] Berkeley Journal of International Law 29, no. 2, 456, p. 465.

This law, being nearly as old as the United States themself, was originally intended to cover torts such as piracy.[280] With time, the US courts also confirmed its applicability to cases of genocide, slave trading, forced labour or war crimes.[281] In spite of its age, it has been brought back to life in relatively recent cases in the context of human rights violations,[282] the first human rights cases being filed against individuals. Several Alien Torts Statute cases had since been filed against corporations, giving hope to victims of human rights abuse by TNCs abroad. The interpretation of the Statute by the US courts, however, has left them rather disappointed.

In 1995, a group of men was executed by hanging in Nigeria. These men were environmental activists protesting against Royal Dutch Shell oil corporation polluting their land. Their execution was a result of a trial allegedly tainted by torture and corruption. In 2002, wives and relatives of the executed men led by Esther Kiobel filed a suit under the US Alien Tort Statute against several affiliated companies incorporated in the Netherlands, the UK and Nigeria[283] (hereinafter together as 'Shell') before the federal court in New York. They claimed that the execution of their relatives was caused by Shell engaging in bribery and witness tampering. Shell was accused of encouraging and aiding extrajudicial killings, crimes against humanity, torture and cruel treatment, arbitrary arrest and detention, violations of the rights to life, liberty, security, and association, forced exile and property destruction.[284] The *Kiobel v. Shell* case made its way to the US Supreme Court, which unanimously declined its jurisdiction. It reasoned that US law is not applicable to violations of the law of nations happening in Nigeria, stating that '[c]*orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.*'[285] The court did, however, not state what connection would be sufficient to secure the jurisdiction of the US courts over TNCs' torts happening abroad. It only stated that the claims must '*touch and concern the territory of the United States with sufficient force.*'[286] Moreover, the court

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[280] Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' [2005] 13 Human Rights Brief, p. 14.

[281] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006), p. 514.

[282] The first groundbreaking case being the 1979 *Filártiga v. Pena-Irala* case 630 F.2d 876 (2d Cir. 1980).

[283] Royal Dutch Petroleum Co., Shell Transport & Trading Co., Plc. and Shell Petroleum Development Company of Nigeria Ltd.

[284] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 113 (2013).

[285] *Ibid.*, p. 125.

[286] *Ibid.*

did not answer the question of whether a corporation has direct obligations under international law.[287]

In other preceding cases under the Alien Torts Statute, however, the US courts have, in principle, accepted that TNCs can be directly responsible for violations of human rights. In *Doe v. Unocal,* the US Court of Appeals found that TNCs may be held responsible under the Alien Torts Statute even when they were only complicit to human rights abuses, aiding and abetting such acts.[288] The court stated that mere knowledge of the abuses was sufficient to establish responsibility and that intention was not required.[289] *Doe v. Unocal* was eventually settled out of court. Nonetheless, the reasoning of the appellate court potentially carried significant precedential value.

In light of the opinions voiced in *Kiobel v. Shell* and *Doe v. Unocal*, a surprising shift in the interpretation of the Alien Torts Statute came in 2014 with the case of *Cardona et al. v. Chiquita*. Chiquita was sued in the US by over four thousand Colombian nationals for funding paramilitary organizations which, in the 1990s, tortured and killed the plaintiffs' relatives. The case was significant in that Chiquita, unlike Shell, is a multinational corporation incorporated in the US, where it also has its headquarters.[290] What is more, Chiquita had, in 2007, pleaded guilty for financing the paramilitary groups in Colombia before a district court in the US and paid a $25 million fine for financing terrorism.[291] In spite of all that, the court, citing *Kiobel v. Shell*, held that there is no connection of sufficient force to link the claim to the US.[292]

Lastly, in 2018, the restrictive interpretation of the Alien Torts Statute was tightened even further by the US Supreme Court in the case of *Jesner v. Arab Bank PLC*. The Supreme Court had, in a split 5-4 decision, held that '[i]*t does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations*

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[287] Andrew Clapham, 'Human Rights Obligations for Non-State-Actors: Where are We Now?' in Fannie Lafontaine and François Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia 2018), p. 21.

[288] *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002).

[289] Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' [2005] 13 Human Rights Brief, p. 15.

[290] US Department of Justice, press release (19 March 2007) <http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html> accessed 1 December 2019.

[291] *Ibid.*

[292] *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014).

or other artificial entities.[293] In relation to the Alien Torts Statute, the Supreme Court further argued that

> *allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts.*[294]

Having in mind that corporations are not recognized as subjects of public international law, the reluctancy of the Supreme Court to defy this notion is understandable. On the other hand, the fact that the home states of the victims of corporate human rights abuses are countries with a certain history and/or unfavourable political climate, as well as the fact that their home states have less functioning judicial systems, is exactly why the victims turn to the courts in the United States. Either way, the hope the victims of corporate human rights abuse happening abroad may have had in the Alien Torts Statute after *Kiobel v. Shell* and *Doe v. Unocal* is likely gone. Even if the courts decided to hear their case, they would be asked to apply international law. And as the regulatory gap regarding corporate responsibility for human rights violations exists in international law,[295] the courts could not bridge the gap by means of interpretation. It is therefore unlikely that the Alien Torts Statute will be the instrument capable to bring justice to those whose human rights have been violated by TNCs.

3.4.2. The obstacle of *forum non conveniens*

Victims of alleged human rights violations happening outside the United States sometimes file lawsuits in the US under other rules than the Alien Tort Statute. For instance, although the *Cardona et al. v. Chiquita* claim described in the previous subsection failed under the Alien Torts Statute, it is still pending in Florida for alleged violations of Colombian law.[296] These cases have

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[293] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1400 (2018).

[294] *Ibid,* p. 1406.

[295] See Chapter 2 on p. 14.

[296] Business & Human Rights Resource Centre, 'Chiquita lawsuits (re Colombia)' <https://www.business-humanrights.org/en/chiquita-lawsuits-re-colombia> accessed on 5 December 2019.

frequently similar factual basis as the cases based on the Alien Torts Statute, arising from circumstances such as environmental harm[297] or poor labour conditions.[298]

However, unless these foreign liability cases are settled, they are still very likely to be dismissed on *forum non conveniens* grounds.[299] This doctrine essentially allows courts to refuse to hear a case if they deem a different forum to be a better suited alternative.[300] It is a right of every defendant to invoke this doctrine and in case of injuries occurring abroad, TNCs as defendants are arguably the main group benefiting from it.[301] This is so because when assessing the *forum non conveniens* motion, the courts generally have a presumption that the plaintiff's home forum is the convenient one. *A contrario* in cases of foreigners, the presumption is that a court in the United States is 'inconvenient'[302] and, if not proven otherwise, the case shall not be heard. Inconvenience is also present in cases where the courts would have to apply unfamiliar law[303] or have worse access to evidence and witnesses.[304] Moreover, according to the judgment *in re Piper v. Reyno*, courts shall not give much relevance to the fact that the alternative forum has less favourable substantive law.[305] Considering these factors, it becomes apparent that the *forum non conveniens* doctrine poses a serious hurdle to foreigners injured by subsidiaries of US-domiciled TNCs in obtaining justice.

Apart from the *forum non conveniens* doctrine *stricto sensu*, some also differentiate the 'act of state' doctrine closely related to the state sovereignty, under which a US court may decline jurisdiction over public acts of another state.[306] Similarly, US courts can decline to adjudicate cases

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[297] E.g. *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823 (D.C. Cal. 2008).

[298] E.g. *David v. Signal International, LLC*, 257 F.R.D. 114 (E.D. La. 2009).

[299] Jonathan C Drimmer and Sarah R Lamoree, 'Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions' [2011] Berkeley Journal of International Law 29, no. 2, 456, p. 470.

[300] Edward L Barrett Jr., 'The Doctrine of Forum Non Conveniens' [1947] 35 Calif. L. Rev. 380, p. 386.

[301] Jacqueline Duval-Major, 'One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff' [1992] 77 Cornell L. Rev. 650, p. 650.

[302] *Ibid.*, pp. 657-658; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981), p. 256.

[303] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981), p. 251.

[304] *Ibid.,* p. 258.

[305] *Ibid.*, p. 247; see also *Vioxx Litigation*, 395 N.J.Super. 358 (2007), p. 366.

[306] Liesbeth F Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012), p. 144 citing Gary B Born and Peter B Rutledge, *International Civil Litigation in United States Courts* (4th ed., Aspen Publishers 2007), pp. 751-812.

concerning political questions, including US foreign policy, in order to preserve separation of powers of the three branches of US government.[307]

An example of the *forum non conveniens* doctrine serving as grounds for US court's refusal to hear a case of serious human rights violations is the infamous *Bhopal litigation*. In 1984 in Indian Bhopal, a poisonous gas leaked from a chemical plant operated by an Indian subsidiary of a US-domiciled corporation, the Union Carbide Corporation. The US-based parent exercised significant managerial control over the subsidiary.[308] The incident, now known as the Bhopal disaster, left thousands of Indians killed or injured.[309] The victims brought a number of cases against Union Carbide Corporation, which were consolidated into one case before the US Federal District Court for the Southern District of New York. The court, however, dismissed the case on the basis of *forum non conveniens.* The court argued that taking up the litigation would mean an excessive burden on the American taxpayers, while stating that India was the more appropriate forum.[310] Interestingly, the Indian plaintiffs were represented by the Indian government and claimed that Indian courts would not adjudicate the case.[311] To this concern, the court argued:

> *In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.*[312]

The Bhopal disaster claims were eventually settled in India, however, the settlement received harsh criticism. Firstly, it was negotiated by the Indian government without the participation of the victims. Secondly, the TNC was granted both civil and criminal immunity. Lastly, the settlement amount was capped without waiting for any estimations of damages.[313]

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[307] *Ibid.*

[308] The US-based mother Union Carbide Corporation held 50.9% of the Indian subsidiary, while the rest was owned by institutional investors; see Liesbeth F Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012), p. 93, note 80.

[309] *Ibid.*

[310] *Ibid.*, citing *Union Carbide gas plant disaster at Bhopal*, 634 F.Supp. 842 (S.D.N.Y. 1986), p. 867.

[311] *Ibid.*

[312] *Union Carbide gas plant disaster at Bhopal,* 634 F.Supp. 842 (S.D.N.Y. 1986), p. 867.

[313] Amnesty International, 'The Clouds of Injustice: Bhopal Disaster 20 Years On' (Amnesty International Publications 2004) <amnesty.org/download/Documents/96000/asa200152004en.pdf> accessed on 7 December 2019.

Therefore, the victims of Union Carbide Corporation's wrongdoings were left without adequate satisfaction. The doctrine of *forum non conveniens* used by the US court to divert the dispute to India paired with the subsequent engagement of the Indian government created an obstacle to holding the Union Carbide Corporation liable in the full extent.

As US courts will be considered *prima facie* 'inconvenient', other human rights plaintiffs from outside the US will face the same hurdles of a relatively high burden of proof to fight off the *forum non conveniens* argument of TNCs.

3.4.3. Jurisdiction of EU member states' national courts

Unlike the United States, other countries do not have a law similar to the US Alien Torts Statute,[314] which would give original jurisdiction to national courts over civil liability claims stemming from violations of international law. The cases brought before their courts against transnational businesses for acts occurring abroad are therefore usually based on general principles of domestic law, especially the tort of negligence.[315] Also for this reason, these cases are not so explicitly framed as human rights cases, although they touch upon important human rights matters.[316] With the restrictions imposed on the applicability of the US Alien Tort Statute, the attention has recently turned to the EU member states in search for a new forum for foreign direct liability cases.[317]

With regard to the EU, the rules determining jurisdiction of courts depend on the domicile of the defendant. In cases of EU domiciled defendants, uniform rules under Brussels I^{bis} Regulation apply. Under this Regulation, a company is domiciled where it has its statutory seat, central administration or principal place of business.[318] In cases of human rights violations happening outside the EU, courts of the EU member states will therefore have jurisdiction over claims against

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[314] Beth Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations' [2002] 27 Yale J. Int'l L. 1, p. 32.

[315] Liesbeth F Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012), p. 88.

[316] Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing 2004), p. 76.

[317] Axel Marx *et al.*, 'Access to legal remedies for victims of corporate human rights abuses in third countries' [2019], study requested by the European Parliament's Sub-Committee on Human Rights, p. 13.

[318] *Ibid.,* Art. 63 (1).

companies[319] which are domiciled in one of the member states. Moreover, as follows from the ECJ's judgment *in re Owusu v. Jackson and Others*, the Brussels regime is strict and does not allow courts to reject jurisdiction on the *forum non conveniens* grounds.[320] However, most of the alleged human rights violations are committed by subsidiaries domiciled outside of the EU.[321] There, the major obstacle to holding EU-based parent companies of TNCs liable is, therefore, the corporate veil.[322]

Conversely, in cases where the defendant is not from one of the member states, domestic law of the individual member states will be applicable.[323] Many member states have domestic rules on jurisdiction similar to the Brussels regime and do not provide for jurisdiction over foreign entities, including subsidiaries of TNCs.[324] Some, however, enable the jurisdiction over a foreign defendant to 'anchor' to jurisdiction over another, domiciled defendant (*i.e.* predominantly the parent company).[325] Naturally, the prerequisite for such anchoring is either piercing the corporate veil, or inferring a primary duty of care of the domiciled defendant. Furthermore, the criteria for establishing such anchor jurisdiction are certain connection between the claims,[326] as well as the lack of abuse of procedural norms.[327]

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[319] Usually a parent company involved in unlawful actions of its foreign subsidiary.

[320] Case C-281/02 *Owusu v. Jackson and Others* [2005] ECR I-1445, paras. 37-46.

[321] Daniel Augenstein, Alan Boyle and Navraj Singh Galeigh, 'Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union' (European Commission 2010), p. 9, para. 19.

[322] *Ibid.,* p. 61, para. 185 and p. 68, para. 209; for more see subsection 3.3 at p. 13 above.

[323] See European Parliament and Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351, Article 6 (1).

[324] Liesbeth F Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012), p. 147.

[325] Augenstein (*supra* note 321), p. 69, para. 213.

[326] E.g. the Dutch Code of Civil Procedure, Book 1: Litigation before the District Courts, the Courts of Appeal and the Supreme Court, Article 7(1) (Artikel 7, lid 1, Rv) allows anchor jurisdiction if '*the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency'*. In the UK, it is the 'necessary and propper' doctrine – see *Vedanta Resources PLC et al. v. Lungowe et al.* [2019] UKSC 20, para. 20.

[327] Christine S Mandap, 'Jurisdiction of Parent Companies' Home State Courts Over Foreign Subsidiaries Abroad: A Comparative Approach Between the Netherlands and the United Kingdom' [2019] Amsterdam Law Forum, Vol. 11 Issue 2, 40, p. 44.

Moreover, in some EU member states, it is possible for courts to assume jurisdiction over extraterritorial human rights violations on the basis of the doctrine of *forum necessitatis*.[328] The courts may do so in order to ensure access to justice if they find that there is a connection of the claim to the forum state and if there is no other forum where the plaintiff can be reasonably expected to sue.[329] Due to narrow interpretation of this rule, however, many cases of transnational human rights violations may fall through the cracks. The following examples from France, the Netherlands and the United Kingdom[330] show different trends in approaching this subject by the EU member states' courts.

On 14 September 2017, the French Court of Cassation rejected to assume jurisdiction in the case of *Comilog* litigation on the basis of *forum neccesitatis*.[331] The case concerned approximately 900 workers from Congo, whose rights were allegedly violated by a Gabonese mining company Comilog. In 1992, the workers sued Comilog in Congo. Their case went through jurisdictional challenges and appeals and had not reached the merits phase even after 25 years since the filing. The necessary connection to France was given, as Comilog is a subsidiary of a French company. The Court of Cassation nonetheless concluded that because the plaintiffs were able to file the lawsuit in Congo, they had access to justice and the doctrine of *forum necessitatis* cannot be applied.[332] Such narrow and arguably very formalistic interpretation of the *forum necessitatis* doctrine and of the notion of access to justice poses a significant obstacle to the transnational human rights litigation in some EU member states.

Contrary to the French court in *Comilog*, several recent decisions of the EU member states' courts approached the notion of access to justice relatively widely. These decisions sparked hope among human rights activists in holding TNCs liable through their EU-domiciled parent

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[328] Burkhard Hess and Martina Mantovani, 'Current developments in forum access: Comments on jurisdiction and forum non conveniens – European perspectives on human rights litigation' [2019] MPILux Research Paper Series 2019 (1), p. 5 in pdf; see also Daniel Augenstein, Alan Boyle and Navraj Singh Galeigh, 'Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union' (European Commission 2010), p. 69, para. 212.

[329] Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' [2014] 30(78) Utrecht Journal of International and European Law 24, p. 24.

[330] Although the UK left the EU with effect on 1 February 2020, all of the case law discussed in this section had been decided before this date and was therefore in compliance with EU laws.

[331] Cour de cassation [Cass.] soc., 14 September, 2017, Rev. sociétés 2018, 467 cited in Burkhard Hess and Martina Mantovani, 'Current developments in forum access: Comments on jurisdiction and forum *non conveniens* – European perspectives on human rights litigation' [2019] MPILux Research Paper Series 2019 (1), note 35.

[332] Hess and Mantovani (*supra* note 328), p. 8 in pdf.

companies. For example, on 1 May 2019, the District Court of the Hague held that it had jurisdiction in the *Kiobel v. Shell* case,[333] which previously failed in the United States.[334] Perhaps even more significant is, however, the judgment on jurisdiction of the Supreme Court of the United Kingdom from 10 April 2019 *in re Vedanta v. Lungowe*.[335] This case concerns a copper mining company Vedanta Resources domiciled in the UK and its Zambian subsidiary. This corporation was sued in 2015 by hundreds of Zambian villagers who lodged a claim in the UK for alleged harm on their health and property. The harm was caused by water pollution due to toxic leaks from the copper mine operated by Vedanta's subsidiary. The Supreme Court, upon Vedanta's challenge, upheld the jurisdiction of UK courts. In relation to Vedanta's duty of care, the court stated that:

> [e]*verything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations* […] *of the subsidiary.*[336]

Having found enough evidence of control to infer a primary duty of care of the parent company, the court did not have to pierce the corporate veil and jurisdiction over the claim against Vedanta was sustained under the Brussels I[bis] Regulation.[337] As to Vedanta's subsidiary, the court then concluded that the jurisdiction of the UK courts shall be upheld, because there was no abuse of process, the defendant was a 'necessary and proper' party and there was a real risk that the Zambian claimants would not be able to obtain 'substantial justice' in Zambia.[338] This risk was specifically found in the potential '*impossibility of funding such group claims where the claimants were all in extreme poverty..'*[339] and *'the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted*

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[333] Business & Human Rights Resource Centre 'Dutch court rules lawsuit brought by Nigerian activists' widows against Shell to be heard in Netherlands' < https://www.business-humanrights.org/en/dutch-court-rules-lawsuit-brought-by-nigerian-activists%E2%80%99-widows-against-shell-to-be-heard-in-netherlands> accessed 9 December 2019.

[334] See subsection 3.4.1 on p. 15 above.

[335] *Vedanta Resources PLC et al. v. Lungowe et al.* [2019] UKSC 20.

[336] *Ibid.,* para. 49.

[337] *Ibid,* paras. 23-41.

[338] *Ibid.,* paras. 88-101.

[339] *Ibid,* para. 89.

effectively.'[340] It seems that the approach of the UK Supreme Court to the notion of access to justice is, as opposed to the French *Comilog* case, leaving formalism behind.

In conclusion, the preconditions for the jurisdiction of the EU member states' courts over the claims against foreign corporations are potentially hard to prove. Certain connection to the member state will be required for making a successful case. In cases of TNCs with EU-domiciled parent companies, a significant level of control over their subsidiary's actions must be proven. Some even fear that the recent developments will only induce the EU-based parent companies to 'take a hands-off approach' towards their subsidiaries.[341] Nonetheless, the decisions of the national courts in the UK and the Netherlands described above indicate that some EU jurisdictions and the UK, having recently left the EU, are a promising new forum for the human rights litigation.

In light of the analysis provided in this Chapter, it can be concluded that national law and national jurisdiction are, under current circumstances, not completely suitable for holding TNCs to account for human rights abuses. The states are not under an obligation to protect human rights outside of their jurisdiction, which is essentially territorial. The states which are home to parent companies of TNCs are frequently profiting from being the country of domicile and are reluctant to regulate the activities of these TNCs beyond national borders. Developing countries are, moreover, often depending on foreign direct investment and are racing to the bottom in terms of regulation in order to keep the investments coming. These factors cause a situation in which the standards to which TNCs must live up to under national law in terms of human rights are rather low.

National law and national jurisdiction are also not designed to provide justice to victims of corporate human rights abuse committed by TNCs. These victims have their access to justice obstructed by several hurdles. The corporate law principle of separate legal personality means that if their rights are violated by a TNC's subsidiary, their chances of obtaining a judgement against the TNC's parent are depending on whether national courts will lift the corporate veil. The burden of proof is, however, set very high in those cases. As the subsidiary may not have sufficient funds, the victims might never be adequately compensated for their loss. Besides the corporate veil, other

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[340] *Ibid.*

[341] Allen & Overy LLP, 'Vedanta: Supreme Court rules that Zambians can seek legal redress in the UK against parent company', p. 3 <https://www.allenovery.com/en-gb/global/news-and-insights/publications/vedanta-supreme-court-rules-that-zambians-can-seek-legal-redress-in-the-uk-against-parent-company> accessed on 9 December 2019.

jurisdictional obstacles in some Western jurisdictions render the likelihood of successful lawsuit rather low.

Considering all of the obstacles to accountable transnational business on national level described in this Chapter, the arguments in favour of a uniform international regulation of business and human rights seem to gain strength. As TNCs are in their nature not confined by national borders, national law without unified international approach can only achieve so much. The argument that '*transnational issues must be approached and addressed by the entire international community differently from that provided for in existing domestic and international legislation*'[342] is thus a reasonable one.

[342] Rafael Burlani and Marcos Leite Garcia, 'The Intrinsic Connection Between Human Rights and the 2030 Agenda in the Context of Transnational Areas Towards International Business' in in Pavel Šturma and Vinícius Almada Mozetic (eds), *Business and Human Rights* (rw&w Science & New Media Passau-Berlin-Prague 2018), p. 27.

4. International soft law instruments on corporate social responsibility

The arguments against extending human rights obligations directly to TNCs come from a certain understanding of what a TNC is and what is its social responsibility. It may be argued that TNCs are private persons and as such can only be beneficiaries of rules protecting human rights.[343] Some also argue that corporations have only one responsibility – to make profit for the shareholders.[344] To imply otherwise would mean that the corporation can interfere into the affairs of the sovereign states and be the 'moral arbiter' on policy issues.[345] Nonetheless, there are numerous instruments establishing rules on corporate social responsibility. Although not directly binding, they do create a new paradigm in which a TNC is morally expected to observe some standards of behaviour.[346] As Ruggie suggests, there are legal norms and social norms based in morality, both of which have normative power *vis-à-vis* business. The social norms, however, have a broader reach, as they expect TNCs to '*respect human rights, irrespective of a state's willingness or ability to enforce the law*.'[347] The normative power of these social norms is evidenced by the fact that TNCs increasingly recognize their social responsibility by adopting new codes of conduct.[348] For example as of December 2019, the UN Global Compact has 9,953 participating companies.[349] Moreover, even though soft law instruments do not impose enforceable obligations, they may develop into hard law in time, either by serving as grounds for negotiating an international treaty, or by providing the necessary state practice for the development of an international customary norm.[350] Lastly, even if they do not crystallize into a binding obligation,

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[343] Peter T Muchlinski 'Human Rights and Multinationals: Is There a Problem?' in David Kinley (ed), *Human Rights and Corporations* (Routledge, 2017) p. 34.

[344] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' [2002] 20 Berkeley J. Int'l L., 45, p. 62; Ralph G Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercantoria*' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005), p. 213.

[345] Peter T Muchlinski 'Human Rights and Multinationals: Is There a Problem?' in David Kinley (ed), *Human Rights and Corporations* (Routledge, 2017) p. 34.

[346] *Ibid.*, p. 35.

[347] John G Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' Corporate Responsibility Initiative Working Paper No. 67 (John F. Kennedy School of Government, Harvard University 2017), p. 13.

[348] *Ibid.*, p. 14; Sarianna M Lundan and Hafiz Mirza, 'TNC evolution and the emerging investment-development paradigm' [2010] UNCTAD Transnational Corporations Vol 19 no 2, 29, p. 37.

[349] UN Global Compact <https://www.unglobalcompact.org/> accessed 19 December 2019.

[350] Jernej L Černič, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' [2008] 4 Hanse Law Review 71, p. 82.

the prominent soft law instruments help in bringing cases of human rights abuses to the public eye, inducing the naming and shaming in the court of public opinion.

The aim of this Chapter is to explore the possibilities offered by the most prominent instruments on corporate social responsibility on a path to the corporate accountability for human rights abuses. To identify which instruments are of most relevance, a 2017 declaration of the G20 leaders comes helpful.[351] There, the G20 leaders committed to '*the implementation of labour, social and environmental standards and human rights in line with internationally recognised frameworks*',[352] explicitly naming the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises.[353] This chapter will therefore examine these three existing instruments, insofar as they concern business and human rights. By looking at the process of developing these instruments, their implementation and the reaction they have received, this Chapter seeks to offer an outlook on how they are advancing the debate on business and human rights and what effect are they capable of inducing.

4.1. United Nations Guiding Principles for Business and Human Rights

In 2005, the UN Secretary General appointed Professor John Ruggie as the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises. His mandate was to identify and clarify standards and best practices in the area of business and human rights and to develop materials for human rights impact assessments.[354] Ruggie's appointment followed a refusal of the UN Commission on Human Rights to adopt the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms). These Norms were developed by the UN Sub-Commission on the Promotion and Protection of Human Rights and intended to impose direct human rights obligations

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[351] G20 Germany, G20 Leaders´ Declaration: Shaping an interconnected world, Hamburg, 7/8 July 2017 <https://www.g20germany.de/Content/EN/_Anlagen/G20/G20-leaders-declaration_nn=2186554.html> accessed 20 December 2019.

[352] *Ibid.*

[353] *Ibid.*

[354] John G Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' Corporate Responsibility Initiative Working Paper No. 67 (John F. Kennedy School of Government, Harvard University 2017), p. 11.

to TNCs.[355] The Norms were, however, rather harshly criticized for their ambiguity by Ruggie himself.[356] He criticized, among other factors, that the Norms did not distinguish between obligations of states and of corporations.[357]

Therefore, when outlining his work as the Special Representative, Ruggie took an approach intentionally different from the one taken by the drafters of the Norms.[358] He opted to incorporate all relevant actors in one 'normative platform', which would align the business-related human rights policy of states, civil society and business.[359] Accordingly, he came up with the 'Protect, Respect and Remedy' Framework (Framework), which is composed of three pillars. The first pillar is based on the state duty to protect against human rights abuses by third parties, the second pillar addresses corporate responsibility to respect human rights and the third pillar deals with the victims' access to effective remedies.[360] Additionally, to implement the Framework, Ruggie introduced the Guiding Principles for Business and Human Rights (GPs).[361] Essentially, '*The Framework addresses what should be done; the Guiding Principles how to do it.*'[362] The GPs were adopted by the UN Human Rights Council in 2011,[363] establishing them as '*the authoritative global reference point for business and human rights.'*[364] The duty of states to protect human rights and thereunder also to provide access to remedy for victims of human rights abuse is relatively well established in international human rights law.[365] Therefore, the second pillar of the Framework, which concerns corporate responsibility to respect human rights, is the most

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[355] John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton 2013), p. 66 in pdf.

[356] Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 22 February 2006, E/CN.4/2006/97, paras. 59 and 69.

[357] Ruggie (*supra* note 355), p. 67 in pdf.

[358] *Ibid.*, p. 80 in pdf.

[359] *Ibid.*, p. 12.

[360] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008), A/HRC/8/5, para. 9.

[361] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011), A/HRC/17/31.

[362] Ruggie (*supra* note 355), p. 90 in pdf.

[363] UN Human Rights Council Res. 17/4, *Human rights and transnational corporations and other business enterprises* (6 July 2011), A/HRC/RES/17/4.

[364] 'UN Human Rights Council endorses principles to ensure businesses respect human rights' (16 June 2011), <https://news.un.org/en/story/2011/06/378662> accessed 13 December 2019.

[365] 2011 Report of the SR (361), pp. 6-7.

innovative. Ruggie calls the second pillar a 'centrepiece' of the Framework and the GPs.[366] As the state obligations were discussed in the previous Chapters, this section will further focus solely on the second pillar, the corporate responsibility to respect human rights.

By giving corporations a separate pillar, independent from the obligations of states, Ruggie sought to provide a clearer delimitation of corporate social responsibility.[367] This responsibility does not stand only on legal norms enforced by the states,[368] but also on social norms of conduct enforced by the public opinion.[369] According to Ruggie, the social norm which requires business to respect human rights derives its normative power from its '*near-universal recognition*'.[370] The GPs define respect as a duty to '*avoid causing or contributing to adverse human rights impacts*',[371] i.e. duty of noninfringement.[372] Importantly, the duty is extended to supply chains of TNCs, by requiring corporations to '*prevent or mitigate*' adverse impacts on human rights in their '*business relationships*'.[373] This prevents TNCs from outsourcing human rights abuses down their value chains.

Besides defining the character and scope of the corporate responsibility to respect human rights, the GPs provide a set of policies and processes corporations should adopt to discharge this responsibility.[374] First, business corporations are expected to adopt and make public a 'policy commitment' of the company to respect human rights.[375] Second, according to Ruggie, to discharge corporate responsibility, the company must 'know' and 'show' that it respects human rights.[376] Therefore, it is required to carry out human rights due diligence.[377] Third, in case the

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[366] Ruggie (*supra* note 355), p. 96 in pdf.

[367] *Ibid.*, p. 97 in pdf.

[368] 2011 Report of the SR (*supra* note 361), p. 13.

[369] *Ibid.*

[370] *Ibid.*

[371] *Ibid.*, p. 13, principle 13(a).

[372] Ruggie (n???), p. 101 in pdf.

[373] 2011 Report of the SR (*supra* note 361), p. 13, principle 13(b).

[374] *Ibid.*, p. 15, principle 15.

[375] *Ibid.*, p. 15, principles 15(a) and 16.

[376] Ruggie (*supra* note 355), p. 104 in pdf; UNGA Third Committee (65th session) 'Statement by Professor John Ruggie: Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (26 October 2010) <https://www.ohchr.org/Documents/Issues/Business/2010GA65Remarks.pdf> accessed 20 December 2019, p. 3.

[377] 2011 Report of the SR (*supra* note 361), pp. 15-16, principles 15(b) and 17.

corporation causes or contributes to an adverse impact on human rights, it should actively engage in remediation.[378]

After the adoption of the GPs in 2011, the Human Rights Council took steps towards supporting better implementation of the GPs. It established the UN Working Group on the issue of human rights and transnational corporations and other business enterprises with a mandate to *inter alia* promote the effective and comprehensive dissemination and implementation of the GPs.[379] The Human Rights Council also established a Forum on Business and Human Rights,[380] which is the largest annual gathering of its kind, bringing together governments, business, civil society, law firms, investors, UN bodies and other stakeholders.[381] As the GPs are addressed to both states and corporations, their implementation is to be realized autonomously on both fronts. States integrate the GPs into national action plans and policies, with the EU leading by example.[382] They are encouraged to do so by regional organizations, such as the Council of Europe[383] and the Organization of American States.[384] Corporations, on the other hand, include commitments into their human rights policies and codes of conduct.[385] Moreover, some of world's largest companies

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[378] *Ibid.*, pp. 15 and 20, principles 15(c) and 22.

[379] UN Human Rights Council Res. 17/4, *Human rights and transnational corporations and other business enterprises* (6 July 2011), A/HRC/RES/17/4, p. 2, para. 6(a).

[380] *Ibid.*, p. 3, para. 12.

[381] UN Human Rights Office of the Hight Comissioner, 'About the UN Forum on business and human rights' <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx> accessed 10 January 2020.

[382] Jitka Brodská and Harald Christian Scheu 'The European Union and its Member States and the Implementation of the UN Guiding Principles on Business and Human Rights' in Pavel Šturma and Vinícius Almada Mozetic (eds), Business and Human Rights (rw&w Science & New Media Passau-Berlin-Prague 2018), p. 157; Beata Faracik 'Implementation of the UN Guiding Principles on Business and Human Rights' [2017] paper requested by the European Parliament's Subcommittee on Human Rights <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf> accessed 20 December 2019, p. 8.

[383] See Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States, *Human Rights and business* (2 March 2016).

[384] See Organization of American States, General Assembly resolution AG/RES. 2840 (XLIV-O/14), *Promotion and Protection of Human Rights in Business* (4 June 2014).

[385] See e.g. Apple Inc., '2018 Statement on Efforts to Combat Human Trafficking and Slavery in Our Business and Supply Chains' < https://www.apple.com/supplier-responsibility/pdf/Apple-Combat-Human-Trafficking-and-Slavery-in-Supply-Chain-2018.pdf> accessed 10 January 2020, p. 3; Michelle Langlois, 'Reporting Trends & Insights: Are Companies Making the Commitment to Respect Human Rights?' (Shift Project Ltd. and Mazars LLP) <https://www.ungpreporting.org/reporting-insights-trends-are-companies-making-the-commitment-to-respect-human-rights/> accessed 10 January 2020.

such as Apple, AT&T, China Mobile, Facebook, Google, Microsoft or Samsung Electronics engage in voluntary self-reporting through the UN Guiding Principles Reporting Framework.[386]

Despite the generally positive acceptance of the GPs by states and the Human Rights Council, the GPs were also criticized, mainly from various human rights NGOs. The main concerns of the NGOs included the lack of enforceability of the GPs and the lack of extraterritorial applicability of the state duty to protect human rights.[387] For example, the Human Rights Watch's business and human rights director commented on the adoption of the GPs stating that '[i]*n effect, the council endorsed the status quo: a world where companies are encouraged, but not obliged, to respect human rights*'.[388] Moreover, although the implementation of the GPs by states and some corporations on policy level has been very broad, real material progress in respect for human rights and access to remedy for victims has not been growing correspondingly.[389]

Ultimately, the evaluation of the GPs' implementation depends on whether one sees the glass as half empty or half full.[390] While the GPs represent an important first step towards accountable business, they are not binding and cannot single-handedly resolve all of the global issues surrounding the adverse impact that business has on human rights. Importantly, however, the GPs managed to shift the global debate from whether corporations should respect human rights to how should they live up to their social responsibility to respect human rights. Moreover, the GPs gave the debate a common language.[391] Thus, although the effectiveness of the GPs may be questioned for their soft law nature, they managed to bring all the relevant stakeholders to one table. Such achievement might not have been realized by a more radical hard-law regulation, as evidenced by the above described failure of the Norms.

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[386] Shift Project Ltd. and Mazars LLP, 'ICT Companies Now in Reporting Database' <https://www.ungpreporting.org/ict-companies-now-in-reporting-database/> accessed 10 January 2020.

[387] Julia R Wetzel, *Human Rights in Transnational Business: Translating Human Rights Obligations into Compliance Procedures* (Springer International Publishing Switzerland 2016), p. 193.

[388] Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards' (16 June 2011), <https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> accessed 6 January 2020.

[389] Faracik (*supra* note 382), p. 17; Jérôme Chaplier, 'Business and human rights: The world is still waiting for action' (16 June 2016) <https://www.euractiv.com/section/development-policy/opinion/business-and-human-rights-the-world-is-still-waiting-for-action/> accessed 10 January 2020.

[390] Faracik (*supra* note 382), p. 17.

[391] *Ibid*.

4.2. OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (Guidelines) are essentially a set of recommendations for responsible business conduct multilaterally agreed by the governments of the OECD countries.[392] The Guidelines were adopted in 1976 as a part of the Declaration on International Investment and Multinational Enterprises, aimed at promoting an open and transparent international investment climate and encouraging corporations to contribute to the economic and social development. They are unique as they are the only instrument on corporate social responsibility adopted directly by national governments.[393] In 2011, the Guidelines were updated in line with the UN GPs on Business and Human Rights to include a new chapter on human rights, a due diligence obligation and extension to corporate supply chains.[394] Although the Guidelines are limited to the adhering countries, the adhering governments encourage TNCs to comply with the Guidelines wherever they operate.[395] The potential reach of the Guidelines is therefore very broad, as the adhering countries are home states of the majority of TNCs and a source of the majority of foreign direct investment.[396]

The Guidelines are voluntary and non-binding, much like the UN GPs. Nonetheless, they do contain an implementation mechanism binding on the adhering governments. The adhering governments are required to set up National Contact Points (NCPs) to promote the Guidelines, handle enquiries and contribute '*to the resolution of issues that arise relating to the implementation of the Guidelines'.*[397] The latter capacity of the NCPs is especially significant in cases of alleged non-compliance with the Guidelines,[398] including human rights abuses.[399] Interested parties such

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[392] Organisation for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises, OECD Publishing. 2011 <http://dx.doi.org/10.1787/9789264115415-en> accessed 20 December 2019, p. 3.

[393] Ondřej Svoboda 'The OECD Guidelines for Multinational Enterprises and the increasing relevance of the system of National Contact Points' in Pavel Šturma and Vinícius Almada Mozetic (eds), *Business and Human Rights* (rw&w Science & New Media Passau-Berlin-Prague 2018), pp. 52, 54.

[394] Ruggie (*supra* note 355), p. 118 in pdf; Organisation for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises, OECD Publishing. 2011 <http://dx.doi.org/10.1787/9789264115415-en> accessed 20 December 2019, pp. 3-4.

[395] OECD Guidelines 2011 (*supra* note 394), p. 17, para. 3.

[396] Elisa Morgera 'OECD Guidelines for Multinational Enterprises' in Thomas Hale and David Held (eds), *Handbook of Transnational Governance: Institutions and Innovations* (Polity Press 2011), p. 315.

[397] OECD Guidelines 2011 (*supra* note 394), p. 68, part I, para. 1.

[398] Svoboda (*supra* note 393), p. 56.

[399] John G Ruggie and Tamaryn Nelson 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges' [2015] 22 Brown J World Aff 99, p. 106.

as adversely impacted individuals, unions and NGOs are entitled to file complaints with the NCPs alleging corporate breaches of the Guidelines. In such cases, the respective NCP may handle both cases of violations committed in the territory of the NCP's state by TNCs seated anywhere in the world, or violations committed anywhere by TNCs seated in the NCP's state.[400] After the 2011 inclusion of the human rights chapter, a considerable majority of submitted complaints concerned human rights.[401] If the complaint (called 'specific instance') is admissible, the NCP acts as a 'forum for discussion',[402] offering conciliation and mediation to the concerned parties. The NCP then, regardless of the outcome, issues a 'statement' which may indicate that a TNC has breached the Guidelines and may also set out recommendations.[403]

The role of the NCPs and the ways of dealing with specific instances have been criticized for multiple reasons. First, the adhering countries 'have flexibility' in organizing their NCPs.[404] Consequently, some NCPs are complex governmental offices, while others are a single designated person.[405] Moreover, there is no clear uniform procedure set for NCPs' handling of complaints. NCPs also have very weak investigatory powers.[406] Such structural and procedural inconsistencies may, according to some, render the whole system of NCPs ineffective.[407] Second, the final statement of the NCP is not binding on the respective TNC and does not impose any penalty. The lack of enforceability may also raise questions as to the effectiveness of the process.[408] Additionally, the process is sometimes criticized for its possible lack of transparency.[409] The

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[400] OECD Watch 'National Contact Points (NCPs)' <https://www.oecdwatch.org/oecd-ncps/national-contact-points-ncps/> accessed 25 December 2019.

[401] 32 of 40 complaints in 2012-2013, 27 of 35 complaints in 2013-2014; see Ruggie and Nelson (*supra* note 399), p. 112.

[402] OECD Guidelines 2011 (*supra* note 394), p. 72, part C.

[403] *Ibid.*, p. 73, para. 3.

[404] OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises* (27 June 2000), OECD/LEGAL/0307, Procedural Guidance I(A).

[405] OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises* [2018], p. 10.

[406] Scott Robinson 'International Obligations, State Responsibility and Judicial Review under the OECD Guidelines for Multinational Enterprises Regime' [2014] 30 Utrecht J Int'l & Eur L 68, p. 73.

[407] *Ibid.*, pp. 72-73.

[408] *Ibid.*, p. 73; Svoboda (*supra* note 393), p. 58.

[409] Robinson (*supra* note 406), p. 73.

reason is that confidentiality is prescribed for procedures regarding a specific instance and even after they are closed, the disclosure is possible only upon a consent of the parties.[410]

Although the potential of the NCPs to serve as gateways for access to remedy against TNCs seems not to be fully realized yet,[411] the specific instances can sometimes provide the exposure necessary to create pressure from the public.[412] Naming and shaming in the court of public opinion has, in some instances, proven as an effective alternative to legal enforcement. After the 2011 inclusion of the human rights chapter to the Guidelines, some cases of specific instances leading to a successful outcome affirm the relevance of this system,[413] with corporations such as Heineken,[414] Kinross,[415] Statkraft[416] and FIFA[417] accepting part of their social responsibility. This, according to some, demonstrates that the NCP system for the Guidelines '*can be effective for providing access to remedy in the business and human rights domain*'.[418]

4.3. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The International Labour Organization was established to prevent social unrest due to adverse work conditions.[419] However, the founders also realised the problem of regulatory 'race

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[410] OECD Decision (*supra* note 404), Procedural Guidance I(C)(4).

[411] Robinson (*supra* note 406), pp. 73-75; Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008), A/HRC/8/5, para. 98.

[412] Svoboda (*supra* note 393), p. 58 citing Sander van 't Foort, 'The History of National Contact Points and the OECD Guidelines for Multinational Enterprises' [2017] 25 Journal of the Max Planck Institute for European Legal History 195, p. 205.>

[413] Svoboda (*supra* note 393), p. 60.

[414] See OECD, the case of Heineken, Bralima and former employees of Bralima (14 December 2015) <http://mneguidelines.oecd.org/database/instances/nl0027.htm> accessed 7 January 2020.

[415] See OECD, the case of Kinross Brasil Mineração and Paracatu neighboring associations (18 June 2013) <http://mneguidelines.oecd.org/database/instances/br0020.htm> accessed 7 January 2020.

[416] See OECD, the case of Statkraft AS and the Sami reindeer herding collective in Jijnjevaerie Sami Village (29 October 2012) < http://mneguidelines.oecd.org/database/instances/se0004.htm> accessed 7 January 2020.

[417] See OECD, the case of Fédération Internationale de Football Association (FIFA) and Building and Wood Workers' International (BWI) (28 May 2015) < https://mneguidelines.oecd.org/database/instances/ch0013.htm> accessed 7 January 2020.

[418] Roel Nieuwenkamp, 'Outcomes from OECD National Contact Point cases: More remedy than you may think!' (12 May 2017) <https://www.permanentrepresentations.nl/latest/news/2017/12/5/blog---outcomes-from-oecd-national-contact-point-cases-more-remedy-than-you-may-think> accessed 7 January 2020.

[419] Ralph G Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercantoria*' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005), p. 203.

to the bottom', i.e. that deregulation of labour can be favoured by governments as it can attract foreign capital.[420] Accordingly, the ILO offers a forum for negotiation of minimum non-negotiable standards of work between all relevant actors - governments, employers and labour organizations.[421]

This tripartite character of the ILO is also reflected in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Declaration), which was first adopted in 1977 and updated several times, most recently in 2017.[422] Much like the UN GPs, the ILO Declaration recognizes that '*different actors have a specific role to play*'.[423] Therefore, besides multinational and local business, it is addressed to governments and employers' and workers' organizations of both the home and the host countries.[424] The ILO Declaration is described as a set of recommendations to be observed on a voluntary basis.[425] Nonetheless, it derives some authority from the fact that it can be seen as an interpretative tool to international labour Conventions, Recommendations and other ILO documents on which it is based.[426] Most significant principles contained in the ILO Declaration from the human rights perspective include those concerning elimination of forced or compulsory labour, effective abolition of child labour, safety and health, freedom of association and the right to organize or access to remedy for victims of human rights abuses.

In terms of implementation of the ILO Declaration, there are several possible procedures available. The ILO Governing Body established the ILO Subcommittee on Multinational Enterprises in 1993. The mandate of the Subcommittee is to '*conduct periodic surveys on the effect given to the* [ILO] *MNE Declaration*' and to '*consider requests for the interpretation of the provisions of the* [ILO] *MNE Declaration*'.[427] Regarding the former, the periodic surveys are

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[420] *Ibid.*

[421] *Ibid.*

[422] International Labour Organization, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (5th ed., International Labour Organization 2017), p. 1.

[423] *Ibid*., p. 4, para. 10.

[424] *Ibid*.

[425] *Ibid*., p. 3, para. 7.

[426] Jernej Letnar Černič, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' [2009] 6 Miskolc J Int'l L 24, pp. 26-27.

[427] International Labour Organization, 'Governing Body - Subcommittee on Multinational Enterprises' <https://www.ilo.org/empent/Informationresources/WCMS_101252/lang--en/index.htm> accessed 9 January 2020.

contributed to by states, employers and workers' organisations to provide information on implementation of the ILO Declaration. As Clapham notes, however, this mechanism is not very effective, because all the names of TNCs are anonymized and very little information on human rights abuse can be derived from the surveys.[428] Regarding the latter mandate, the Subcommittee takes part in considerations of requests for interpretation of the ILO Declaration, which are primarily to be field by governments.[429] These requests must follow from a disagreement on meaning of provisions of the ILO Declaration concerning an actual situation.[430] Moreover, the requests cannot be filed if they would conflict with matters of national law or international labour Conventions and Recommendations.[431] This primacy of national law potentially renders the ILO Declaration less effective.[432] Although the procedure concerns an actual specific situation and thus might resemble a dispute resolution mechanism, it is only aimed at clarifying the standards contained in the ILO Declaration.[433]

Although the ILO Declaration is criticized for its weakness in terms of enforceability, it is still one of the most prominent international instruments on corporate social responsibility. It embodies minimum international labour standards and as such lays a solid foundation for possible future hard obligations.[434]

In conclusion, the selected soft law instruments described in this Chapter are not enforceable and thus certainly not the best solution many human rights defenders would hope for. They are, nonetheless, very important contributions to the debate surrounding transnational business and its responsibility to respect human rights. Every time a large-scale business-related violation of human rights occurs, these instruments provide a benchmark against which it can be measured. Although they will not trigger responsibility and courts will not enforce them, they can provide basis for the formation of public opinion and potential platform for naming and shaming. The positive influence of drafting such widely recognized voluntary instruments and formulating more refined principles and best practice is evidenced by the subsequent practice of some TNCs,

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[428] Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press 2006), p. 216.

[429] *Ibid.*, p. 217.

[430] ILO Declaration (422), p. 24, para. 1.

[431] *Ibid.*, para. 2.

[432] Muchlinski (*supra* note 345), p. 477.

[433] *Ibid.*, p. 475.

[434] *Ibid.*, p. 506.

which are voluntarily including them into codes of conduct. Likewise, many states are using them as tools to develop national policy and action plans on business and human rights.

Since these instruments on corporate social responsibility are not binding, they cannot fill the gaps in international and national law when it comes to enforcing responsibility of TNCs for human rights violations. However, they clearly formulate standards and principles which can be used when filling these gaps either as a guidance, an inspiration, or a verbatim draft. Most importantly, they help to shift the perception of corporations as simply profit-generating vehicles to entities endowed with responsibility owed to the society.

Conclusion

With the rapid globalisation of markets, states are no longer the only stakeholders capable of influencing, positively and negatively, the enjoyment of human rights. Transnational business has rapidly caught up with states in terms of economic power. In the host states, TNCs hold a significant leverage, as their investment is a powerful catalyst for economic development. However, the law and policy has not kept up with the changing reality of the distribution of power in the world. Although transnational business has increasingly been implicated in adverse human rights abuses, the victims of such abuses have faced many obstacles in holding the perpetrators to account. Due to this seeming regulatory gap, a need for a more effective accountability mechanism has been discussed among policy makers, scholars and civil society with conflicting outcomes. The solution could lie in a new comprehensive and uniform international treaty on business and human rights. Equally so, national law could suffice in achieving accountable business, if the concerned states set appropriate standards for business conduct and enforce their laws efficiently. The existing soft law instruments also have potential to induce TNCs to accept their social responsibility to respect human rights. This paper examined the underlying reasons why these possible accountability mechanisms do not exist or fall short of bridging the gap between power and responsibility of TNCs. The analysis contained in three separate chapters followed the division to international law, national law and soft law instruments.

Chapter 2 set out to answer the following research question:

What are the current obstacles to holding TNCs responsible for human rights abuses under public international law?

Upon a conceptual analysis of the notion of legal personality in public international law, it became apparent that the obstacle lies in legal theory. The concept of international legal personality, i.e. the ability to have rights and obligations under international law, limits the number of subjects of public international law to a minimum. When observed from the historical perspective, this paradigm, in which states have the dominant personhood and exceptionally recognize some other subjects, makes sense. Equally in terms of human rights law, historically it was the state that represented the ultimate danger to the enjoyment of human rights and therefore it was also the state whose behaviour needed to be regulated. From a pragmatic standpoint, however, the changing power dynamics in transnational affairs could eventually induce a shift in this paradigm. Drafting a new, legally binding instrument to regulate, in international human rights law, the activities of TNCs, could be the appropriate tool. Careful balance, however, needs to be achieved between the requirements of developed states and of the developing states, civil society

and victims of human rights violations. Otherwise, the end product will either be a very strong treaty with very few signatories, or a very weak proclamation incapable of changing the *status quo*.

This paper, moreover, uncovered obstacles to using international criminal law to enforce corporate human rights obligations. Firstly, international criminal responsibility is still limited to natural persons. Even if, however, it was extended to legal persons, the majority of human rights abuses committed by TNCs would not be prosecuted, because they would not reach the intensity required for international crimes. Therefore, although potentially useful in certain limited cases, international criminal law cannot substitute enforcement mechanisms missing in international human rights law. This conclusion, again, supports the argument in favour of drafting a new international treaty on business and human rights.

Chapter 3 was dedicated to answering, through comparative analysis of legal rules from different jurisdictions, the following research question:

Can TNCs be held accountable for human rights abuses on the national level?

National law is the principal jurisdiction for legal regulation of TNCs. It is therefore essential to understand its current pitfalls in order to establish whether uniform international regulation of TNCs is necessary. This thesis scrutinised the limits of the duty of states to protect human rights and established that it is essentially territorial, hence excluding extraterritorial operations of TNCs from its scope. Furthermore, the economic benefits of having a TNC domiciled in the territory of one state do not motivate that state to tighten the regulation of external business activities of such corporations. Meanwhile, developing states are forced to race to the bottom in terms of regulation in order to attract foreign capital. All of these factors indicate that regulating transnational issues on the national level without any incentive to adhere to certain standards is not fit for the purpose of adequate protection of human rights.

In terms of jurisdictional obstacles to corporate accountability on the national level, this paper identified several issues. First, the corporate veil created by the corporate law principle of separate legal personality enables TNCs to evade responsibility for human rights abuses by establishing special purpose vehicles. As the allocation of business-related risks is accepted as legitimate, the national courts are generally not willing to pierce the corporate veil. The victims are therefore facing a heavy burden of proof, which renders their chances of obtaining justice rather small. Moreover, other jurisdictional obstacles, including those specific to foreign direct liability cases, have been identified. The US and the EU were chosen for this analysis as jurisdictions with

particularly large number of domiciled TNCs. First, the case law on the US Alien Torts Statute was analysed. This instrument of national law enabling national courts to apply international law was invoked by victims of TNCs on several occasions. However, the interpretation of this statute was limited by the US Supreme Court in an extent which makes the success of further similar cases highly unlikely. Moreover, victims of business-related human rights abuse happening abroad are facing the obstacle of the doctrine of *forum non conveniens*, frequently invoked by TNCs as defendants. As the US courts will be considered *prima facie* 'inconvenient', human rights plaintiffs from outside the US will face the hurdle of a relatively high burden of proof to fight off the *forum non conveniens* argument. Lastly, the courts of the EU member states are seeing an increasing influx of foreign direct liability cases. The *forum neccesitatis* principle could help some plaintiffs with suing foreign corporations before EU member state's courts. However, the interpretation of this principle is still quite inconsistent across the EU. Although some recent cases indicate that some victims of TNCs will be able to obtain justice in the EU, this forum is not likely to provide justice for all the victims of transnational business who need it.

Considering the obstacles described in Chapter 3, it must be stated that although some TNCs can potentially be held accountable for human rights abuses on the national level, national law is not well positioned to hold all TNCs to account and to secure justice for all victims of business-related human rights abuse. This conclusion therefore also strengthens the arguments in favour of a uniform international regulation of business and human rights. As TNCs are in their nature not confined by national borders, national law without unified international approach can only achieve so much.

Lastly, Chapter 4 describes some of the most prominent soft law instruments on corporate social responsibility, namely the UN GPs, the OECD Guidelines and the ILO Declaration with the aim to answer the following research question:

Can the accountability mechanisms offered by existing international soft law instruments on corporate social responsibility fill the gaps in legal regulation of TNCs?

Since all of the examined instruments are voluntary in nature, they cannot, strictly speaking, fill the gaps of hard law regulation. They are, nonetheless, significantly shaping the debate concerning TNCs and their role in the society. Thanks to their existence, TNCs and business corporations in general are increasingly being seen as not only entities generating profit for their shareholders, but also as important stakeholders in social development, capable of helping to secure the enjoyment of human rights around the globe. In broader sense, these instruments might

even help to fill the existing gaps in regulation of TNCs. Firstly, they provide a strong benchmark for corporate behaviour, which may induce naming and shaming in the court of public opinion. Moreover, some TNCs are realizing the impact of these instruments and are voluntarily implementing them into their codes of conduct. Likewise, states are adopting the principles formulated in those instruments into national policies and action plans. Lastly, the principles and definitions contained in these soft law instruments may serve as inspiration for the drafting of a binding international treaty, or national legislation. The importance of the soft law instruments on corporate social responsibility therefore should not be underestimated.

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Abstrakt v českém jazyce

Potřeba efektivní regulace nadnárodních společností a jejich odpovědnosti za porušování lidských práv je již po tři desetiletí tématem, které silně rezonuje v mezinárodní diskusi. Navrhovaná řešení nedostatku odpovědnosti v této souvislosti se ale, stále, velmi liší. Patří mezi ně například názor, že by povinnosti států podle existujících norem mezinárodního práva v oblasti lidských práv mohly být rozšířeny na obchodní korporace. Také by mohla být sjednána nová mezinárodní úmluva týkající se obchodu a lidských práv. Dalším z názorů je, že by nadnárodní společnosti měly být odpovědny podle národního práva. Tato práce byla původně inspirována touto diskusí a má za cíl identifikovat mezery v právní regulaci a poskytnout tak lepší porozumění tomu, které možnosti dalšího vývoje v této oblasti jsou možné a za jakých okolností.

S ohledem na tyto cíle tato práce nejprve identifikuje překážky odpovědnosti nadnárodních společností za porušování lidských práv v rámci mezinárodního práva veřejného. Zaměřuje se přitom na koncepční analýzu právní osobnosti v mezinárodním právu veřejném a na meze právní osobnosti nestátních subjektů, konkrétně korporací, v mezinárodním právu týkajícím se lidských práv. Práce se dále věnuje mezinárodnímu trestnímu právu a zkoumá, zda mezinárodní trestní právo může sloužit jako prostředek výkonu práva v oblasti lidských práv. S ohledem na argument, že by měl být zachován *status quo* a ochrana lidských práv před korporacemi by měla být ponechána v rukou jednotlivých států, identifikuje tato práce také nejvýznamnější překážky odpovědnosti nadnárodních společností za porušování lidských práv na národní úrovni. Zaměřuje se přitom na teritoriální omezení jurisdikce států, na politické a ekonomické faktory, problematiku firemní roušky a také na některé překážky, kterým čelí žalobci v občanskoprávních sporech proti nadnárodním společnostem. Konečně se tato práce věnuje také odpovědnostním mechanismům, které nabízí vybrané právně nevynutitelné (soft law) nástroje týkající se sociální odpovědnosti podniků. Cílem je zjistit do jaké míry potenciálně mohou tyto nástroje vyplnit mezery v právně vynutitelné úpravě.

V návaznosti na provedenou analýzu dochází tato práce k závěru, že za účelem zajištění odpovědných nadnárodních obchodních společností, které respektují mezinárodně uznaná lidská práva, je třeba řešit problémy způsobené jejich nadnárodním charakterem na mezinárodní úrovni. Z tohoto důvodu se jako nejvhodnější pro naplnění tohoto cíle jeví komplexní a jednotná mezinárodní regulace prostřednictvím mezinárodního smluvního práva.

Klíčová slova

nadnárodní korporace, lidská práva, sociální odpovědnost podniků

Abstract in English

The need for an effective regulation of transnational corporations and its responsibility for human rights abuses has been a topic resonating strongly in the international debate for the past three decades. The suggested solutions to the lack of accountability of transnational business, however, still vary. Among them are suggestions that obligations of states under existing international human rights law could be extended to corporations, a new binding international treaty on business and human rights could be adopted, or that transnational corporations should be held to account under national law. This paper was initially inspired by this debate and seeks to identify the gaps and loopholes in legal regulation to provide better understanding of which ways forward are feasible and under what circumstances.

Given these specific objectives, this paper firstly identifies the obstacles to holding transnational corporations responsible for human rights abuses under public international law. It focuses on a conceptual analysis of legal personality in public international law and the limits to legal personality of non-state actors, specifically corporations in international human rights law. This paper then turns to international criminal law and examines whether international criminal law is capable of providing the missing enforcement tool. Considering the argument in favour of maintaining the *status quo* and leaving the protection of human rights from business to individual states, this paper also identifies the most prominent obstacles to holding transnational corporations accountable for human rights abuses on the national level. It focuses on the territorial limitations of state jurisdiction, political and economic factors, the issue of corporate veil as well as certain jurisdictional hurdles posed to claimants in transnational civil liability cases. Lastly, this paper describes the accountability mechanisms offered by selected soft law instruments on corporate social responsibility. While doing so, it seeks to establish to what extent are these instruments potentially capable of filling the gaps in hard law.

Upon this analysis, this paper draws the conclusion that in order to secure responsible transnational business which respects the internationally recognized human rights, the problems created by the transnationality of transnational corporations must be addressed on the international level. Therefore, a complex and uniform international regulation through international treaty law seems to be best suited to fulfil this purpose.

Keywords

transnational corporations, human rights, corporate social responsibility